72-138 FILE COPY

Supreme Court, U. S.
FILED
JUL 24 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

Docket No. 72-138

WALTER R. ANDERSON, THEODORE C. ANDERSON, DAVID W. ANDERSON, and LAKELAND DEVELOPMENT CORPORATION, and THEODORE C. ANDERSON, as administrator D.B.N. of the estate of EUGENE ANDERSON, Deceased,

Plaintiffs-Appellants,

vs.

LECON PROPERTIES, INC., a Minnesota corporation,

Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN THE EIGHTH CIRCUIT

HARRY H. PETERSON
Attorney for Plaintiffs-Appellants
738 Midland Bank Bldg.
Minneapolis, Minn. 55401
(612) 335-5254

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statutes Involved	4
Statement	5
Reasons for Granting the Writ	12
Certificate of Counsel	13
Exhibit I	14
Exhibit II	17
Exhibit III	18

AUTHORITIES CITED

PAGE

Cases:

American Federation of Labor vs. Swing, 312 U.S. 715, 61 S. Ct. 568 and 735, 85 L. Ed. 855 13

Arrowsmith vs. Gleason, 129 U.S. at pp. 100-101, 32 L. Ed. at p. 635 11

Hanson vs. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 1283 ..... 8, 12

Hoven vs. McCarthy Bros. Co., 163 Minn. 339, 204 N.W. 29 8

Johnson vs. Jefferson, 191 Minn. 631, 255 N.W. 87 8

Johnson vs. Waters, 111 U.S. 640 at p. 667, 28 L. Ed. at p. 356 11

N.A.A.C.P. vs. Alabama, 377 U.S. 288, 84 S. Ct. 1302, 12 L. Ed. 2d 325 12

Norris Grain Co. vs. Nordaas, 232 Minn. 91, 46 N.W. 2d 94 ..... 8, 9

Pennoyer vs. Neff, 95 U.S. 714, 24 L. Ed. 565 8

Pennsylvania Co. vs. Scott, 346 Pa. 13, 29 A. 2d 328, 144 A.L.R. 851 8

Sache vs. Wallace, 101 Minn. 169, 112 N.W. 386 ..... 8, 9

Shelley vs. Kraemer, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, 3 A.L.R. 2d 441 ..... 10, 12

Swanson vs. Alworth, 159 Minn. 193, 198 N.W. 453 8

Tankar Gas vs. Lumbermen's Mut. Casualty Co., 215 Minn. 265, 9 N.W. 2d 754, 146 A.L.R. 1223 8

PAGE

U. S. to the Use of Wilson, Etc. vs. Walker, 109 U.S. 258, 27 L. Ed. 927 11

Vallely vs. Northern Fire & Marine Ins. Co., 254 U.S. 348, 41 S. Ct. 116, 65 L. Ed. 297 ..... 8, 9, 12

Western Union Telegraph Co. vs. Com. of Penn., 368 U.S. 71, 82 S. Ct. 199, 7 L. Ed. 139 12

Constitutions:

28 U.S.C. Sec. 1254(1) 2

28 U.S.C. Sec. 2201 4

42 U.S.C.A. Sec. 1983 ..... 3, 4

Amendment V to the Constitution of the United States 3

Amendment XIV, Section 1 to the Constitution of the United States 3

Article 6, Section 2 of the Constitution of the State of Minnesota (2 M.S.A., pp. 174-175) 3

Statutes:

M.S.A. Sec. 480.04 3

M.S.A. Sec. 586.01 ..... 3, 8, 11

M.S.A. Sec. 586.11 3

38 M.S.A. Sec. 586.01 4

Civil Rights Statute, 42 U.S.C. Sec. 1983 10

Miscellaneous:

16 Am. Jur. 2d, Const'l Law, Sec. 379, p. 716 8

16 Am. Jur. 2d, Const'l Law, Sec. 491, pp. 854-855 10

16A C.J.S., Sec. 568, p. 557 10

IN THE

Supreme Court of the United States

October Term, 1971

Docket No. _____

WALTER R. ANDERSON, THEODORE C. ANDERSON, DAVID W. ANDERSON, and LAKELAND DEVELOPMENT CORPORATION, and THEODORE C. ANDERSON, as administrator D.B.N. of the estate of EUGENE ANDERSON, Deceased,

Plaintiffs-Appellants,

vs.

LECON PROPERTIES, INC., a Minnesota corporation,

Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN THE EIGHTH CIRCUIT

Walter R. Anderson, David W. Anderson, Theodore C. Anderson, Lakeland Development Corporation, a Minn. Corp., and Theodore C. Anderson as Administrator D.B.N. of the Estate of Eugene W. Anderson, deceased, by Harry H. Peterson, their attorney duly authorized so to do, petition this Court for a Writ of Certiorari to review the Judgment entered be-

low on March 29, 1972, and the Order Denying the Petition for Rehearing dated April 25, 1972, affirming the Judgment entered by the United States District Court for the District of Minnesota on July 19, 1971.

OPINIONS BELOW

The opinion below is attached hereto (Exhibit I) and the Order denying the motion for a rehearing is attached hereto (Exhibit II) and the Findings, Conclusions and Judgment of the District Court are attached hereto (App. pp. 62-70), Exhibit III).

The decision of the District Court has not been published.

The decision of the United States Court of Appeals is reported at *457 Fed. 2d 929.*

JURISDICTION

The jurisdiction of this Court is invoked under *28 U.S.C., Section 1254(1).*

QUESTIONS PRESENTED

The questions presented are:

1. Whether the institution and prosecution of an action for declaratory relief that a State Court Judgment is void for lack of jurisdiction constitutes an attempt to review on appeal or is separate independent legal action.

2. Whether a State Court Judgment under the Constitution and laws of the State of Minnescta is void for lack of jurisdiction where such a Judgment is prohibited by State law.

3. Whether a party deprived of a State Court Judgment by another State Court Judgment void for lack of jurisdiction

may assert his rights in a separate action as a claim of denial of civil rights under the following:

The Fifth Amendment to the Constitution of the United States.

Sec. 1, Fourteenth Amendment to the Constitution of the United States (the equal protection of the laws and due process clauses thereof).

42 U.S.C.A. Sec. 1983.

28 U.S.C.A. Sec. 1343(3), 2201, 2202, 2281, and 2284 Article 6, Sec. 2 of the Constitution of Minnesota.

M.S.A. Sec. 480.04.

M.S.A. Sec. 586.01.

M.S.A. Sec. 586.11.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the Constitution of the United States: No person shall ". . . be deprived of . . . property without due process of law. . . ."

Amendment XIV, Section 1 to the Constitution of the United States: ". . . Nor shall any State deprive any person of . . . property, without due process of law; . . . ."

Article 6, Section 2 of the Constitution of the State of Minnesota (2 M.S.A., pp. 174-175) which reads as follows:

> "The Supreme Court shall consist of one chief justice and six associate judges. It shall have original jurisdiction in such remedial cases as may be prescribed by law, and appellate jurisdiction in all cases, both in law and in equity, but there shall be no trial by jury in said Court."

STATUTES INVOLVED

The jurisdiction of the Supreme Court of Minnesota, and in fact of all the Courts of the state, is prescribed by statute, *38 M.S.A. Sec. 586.01*, which reads:

> "The writ of mandamus may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. It may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, *but it cannot control judicial discretion.*"

42 U.S.C. Section 1983 reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. Sec. 1979."

28 U.S.C. Section 2201 reads as follows:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

STATEMENT

(All references made in parentheses
are to pages of the Appendix.)

Petitioners recovered a judgment on May 26, 1969, which was amended on April 21, 1970, in the District Court of Anoka County, Minnesota, in an action brought by them for the purpose of recovering a Judgment providing that the petitioner, Lakeland, was entitled to a reconveyance to Lakeland of certain lands described in the Complaint (9-21). The Judgment provided that Lakeland was entitled to such reconveyance "upon tender and payment to Lecon . . . of all moneys Lecon has paid to Lakeland and the fee owners pursuant to the contracts with Lakeland and subsequently including taxes, assessments, and interest at six per cent (6%)" (9-11; 27-28). The Judgment of May 26, 1969 also provided that Lakeland was to have six (6) months from the date of the Judgment within which to make the payments mentioned (17).

An attorney, William B. Korstad, who was the attorney for Lakeland and also for Lecon, unbeknown to the petitioners, negotiated the conveyance of the property from Lakeland to Lecon. He was subsequently held liable as an attorney for breach of his duty as attorney for a Judgment against him of $24,830.00 which was affirmed by the Supreme Court of Minnesota on May 19, 1972 (*197 N.W. 2d 720*).

Respondent, Lecon, appealed to the Supreme Court of Minnesota from the Judgment rendered in favor of Lakeland on May 26, 1969. Lecon's Brief and Appendix, as appellant, were required by the rules of the Supreme Court of Minnesota to be filed and served on or before October 14, 1969. The six months within which Lakeland was authorized to tender payment to Lecon for a reconveyance expired on November 23, 1969 (32-

33). During the pendency of the Appeal, Lecon obtained numerous extensions of the time in which to file its Brief and Appendix as the Appellant so as to extend such time beyond the six months allowed by the Judgment within which Lakeland could make payment for a reconveyance. These extensions of time were granted by the Supreme Court of Minnesota without granting at the same time an extension of time to Lakeland within which to make the tender (30-33).

During the pendency of the Appeal so taken by Lecon from the Judgment of the Anoka County District Court dated May 26, 1969, and after the lapse of the time within which Lakeland was authorized to make the tender in question, the Supreme Court of Minnesota, upon Motions by the parties, remanded the case to the District Court of Anoka County by an Order which authorized the District Court to "grant such relief to any of the parties as the facts and law may require or warrant" and authorize the parties "to seek such relief from the Judgment entered herein as they may be advised" (22). Thereupon, upon Motions made in the District Court of Anoka County, that Court granted in part Lakeland's motion by amending the Judgment so as to provide that Lakeland "shall have nine (9) months from the date of the entry of Judgment herein, on the event there is an appeal to the Supreme Court by Lecon Properties, Inc., six (6) months after the final determination by the Supreme Court, to make such tender and payment . . ." (24-28).

After the Judgment was so amended, and while the appeal so taken by Lecon was undecided and pending in the Supreme Court of Minnesota, the Supreme Court of Minnesota upon Lecon's Petition therefore granted on October 10, 1970 a Writ of Mandamus commanding and directing the District Court of Anoka County to vacate the amended Judgment of April 21,

1970, and to grant a Motion made by Lecon on January 30, 1970 for dismissal of the proceedings in the Anoka County District Court (56). The District Court of Anoka County obeyed and complied with the writ on October 14, 1970 (57-58).

The effect of the vacation of the Anoka County Judgment by means of the writ of mandamus was "deprivation of the rights of Lakeland . . . in an amount in excess of $400,000.00. . . ." (8).

The writ of mandamus was granted by the Supreme Court of Minnesota notwithstanding the fact that the appeal taken by Lecon was still pending before it and undecided. The Summons in this case was served on May 11, 1971. It was asserted at the hearing of the motion in the United States District Court that the Supreme Court of Minnesota had dismissed Lecon's appeal on March 3, 1971, a statement which we concede. Accordingly, Lakeland had until September 1, 1971, that is, six months after the appeal to the Supreme Court of Minnesota had been disposed of, or forty-six (46) days after the date of the Judgment of the United States District Court on July 19, 1971, which is the Judgment which petitioners sought to have reversed in the Court below.

If the United States District Court had declared petitioners' rights in accordance with the Judgment of the District Court of Anoka County, Minnesota, rendered on April 21, 1970, as aforesaid, Lakeland would have had the right under the Judgment to make the tender to Lecon for a reconveyance of the property in question for a period of 46 days subsequent to the date of the Federal District Court Judgment. If Lecon had refused to accept the tender and make a reconveyance to Lakeland as required by the Judgment, Lakeland could have applied to the Court for leave to pay the money into Court under Federal Rule of Civil Procedure 67.

Below, in the Court of Appeals, petitioners showed:

1. That the Anoka County Judgment in their favor was property entitled to the protection of the due process clause of the Fourteenth Amendment of the Constitution of the United States and also of the equal protection clause.

Pennoyer vs. Neff, 95 U.S. 714, 24 L. Ed. 565.

Hoven vs. McCarthy Bros. Co., 163 Minn. 339, 204 N.W. 29.

Johnson vs. Jefferson, 191 Minn. 631, 255 N.W. 87.

Tankar Gas vs. Lumbermen's Mut. Casualty Co., 215 Minn. 265, 9 N.W. 2d 754, 146 A.L.R. 1223.

Pennsylvania Co. vs. Scott, 346 Pa. 13, 29 A. 2d 328, 144 A.L.R. 851.

16 Am. Jur. 2d, Const'l Law, Sec. 379, p. 716.

2. That the writ of mandamus by which the Anoka County Judgments in favor of the petitioners were vacated was absolutely void for lack of jurisdiction of the Supreme Court of Minnesota to grant the writ.

38 M.S.A. Sec. 586.01.

Swanson vs. Alworth, 159 Minn. 193, 198 N.W. 453.

Hanson vs. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 1283.

Vallely vs. Northern Fire & Marine Ins. Co., 254 U.S. 348, 41 S. Ct. 116, 65 L. Ed. 297.

Norris Grain Co. vs. Nordaas, 232 Minn. 91, 46 N.W. 2d 94.

Sache vs. Wallace, 101 Minn. 169, 112 N.W. 386, and other authorities to like effect.

In the *Norris Grain Co.* case, *supra*, the Supreme Court of Minnesota held (*46 N.W. 2d 99*):

> "Where the court has no jurisdiction of the subject matter and that fact appears from the face of the record itself (as here), its orders are a *nullity*."

In the *Vallely* case, *supra*, holding that the court, which rendered the judgment, had no jurisdiction of the subject matter on the ground that it acted in excess of the power conferred on it by statute, the decision reads (*254 U.S. 353-354*):

> "Courts are constituted by authority and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal." (Citing many cases.)

In *Sache vs. Wallace* (also cited as *Sache vs. Gillette*), *supra*, where the court held in an opinion written by Justice Calvin Brown (*112 N.W. 388*):

> "A judgment in violation of the statute cannot, therefore, be a mere irregularity to be cured by amendment, but the exercise of power expressly withheld from the court, and consequently beyond its jurisdiction. Although every exercise of power not possessed by a court will not necessarily render its action nullity, it is clear that every final act, in the form of a judgment or decree, granting relief the law declares shall not be granted, is void, even when collaterally called in question. This is fundamental. . . ."

In the *Norris Grain* case, *supra*, the Court further held that a judgment rendered without jurisdiction of the subject matter was absolutely void and may be attacked at any time

and any place, and that "*A court without jurisdiction of the subject matter of an action can acquire no jurisdiction by erroneous decision that it has jurisdiction*" (*46 N.W. 2d 99*).

3. That the decision of the Supreme Court of Minnesota granting the writ constituted *state action* within the meaning of the *Civil Rights Statute, 42 U.S.C. Section 1983.*

Hanson vs. Denckla, supra.

Shelley vs. Kraemer, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, 3 A.L.R. 2d 441.

16 Am. Jur. 2d, Const'l Law, Sec. 491, pp. 854-855.

16A C.J.S., Sec. 568, p. 557.

In answer to the petitioners' contentions below, the Court of Appeals disposed of the same by holding that the Supreme Court of Minnesota had jurisdiction over the parties and of the subject matter of the controversy (page 3 of the Opinion). Of course, the Court had jurisdiction of the parties; but it had no jurisdiction of the subject matter for the reasons already stated that the Court was prohibited from granting the writ to control judicial discretion. The vacation of the Anoka County Judgments was an exercise of judicial action and discretion. It was an attempt by the Court to use the writ for a prohibited purpose. This prohibition is in the plainest language of the Minnesota Statutes defining the jurisdiction of the Supreme Court of Minnesota pursuant to the Constitution of Minnesota (these are set forth on page 6 of our Brief below). The statute expressly provides that the writ of mandamus "cannot control judicial discretion".

In this respect, the United States District Court also erred in that it held that the vacation of the judgment was a purely clerical act and it did not make any difference how the Anoka County Judgments were vacated. A complete answer to the holding of the Court of Appeals that jurisdiction of the person

and the subject matter is complete jurisdiction is refuted by *U. S. to the Use of Wilson, Etc. vs. Walker, 109 U.S. 258, 27 L. Ed. 927*, where the Court held at *page 929*:

> "Although a Court may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void."

The quotation covers the situation in the instant case exactly.

No point was raised below in either of the courts to the effect that petitioners were not entitled to declaratory relief in the event that they were entitled to any relief at all.

The Court of Appeals erred also in holding that the institution of the present action in the United States District Court constituted an attempt to secure relief from the Anoka County Judgment as by an Appeal and that petitioners' only remedy was by direct appeal from the Supreme Court of Minnesota to this Court. In this respect, the Court of Appeals erred.

Johnson vs. Waters, 111 U.S. 640 at p. 667, 28 L. Ed. at p. 356.

Arrowsmith vs. Gleason, 129 U.S. 86 at pp. 100-101, 32 L. Ed. at p. 635.

After holding that an independent action instituted to vacate a Judgment upon grounds sufficient for the purpose, the Court held in the *Arrowsmith* case, *supra*:

> "In such cases the Court does not act as a Court of review, nor does it inquire into any irregularities or errors or proceedings in another Court. . . ."

Thus the Court of Appeals committed a clear error by the holding in question.

Furthermore, the Court of Appeals did not cite, refer to or discuss *Minnesota Statutes, Section 586.01* to the effect that

mandamus "cannot control judicial discretion". Apparently the Court of Appeals did not consider this statute at all and, consequently, failed to consider the very statute, which controlled decision in any event.

Thus it appears that the petitioners made out a clear case for the recovery of a declaratory judgment in the United States District Court which should have been affirmed by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. The decisions below to the effect that the Supreme Court of Minnesota had jurisdiction is directly contrary to the holdings of this Court.

Hanson vs. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 1283.

Vallely vs. Northern Fire & Marine Ins. Co., 254 U.S. 348, 41 S. Ct. 116, 65 L. Ed. 297.

2. The decisions below to the effect that petitioners had not made out a case under the *Civil Rights Act, 42 U.S.C. Section 1983*, is directly opposed to the decisions of the Court in:

Western Union Telegraph Co. vs. Com. of Penn., 368 U.S. 71, 82 S. Ct. 199, 7 L. Ed. 139.

Hanson vs. Denckla, supra.

Shelley vs. Kraemer, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, 3 A.L.R. 2d 441.

N.A.A.C.P. vs. Alabama, 377 U.S. 288, 84 S. Ct. 1302, 12 L. Ed. 2d 325.

3. The decision of the Court of Appeals to the effect that the institution of this action was in effect one for a review as on appeal of the judgment of the Supreme Court of Minne-

sota in issuing the writ of mandamus is directly opposed to the *Johnson vs Waters, supra*, and *Arrowsmith vs. Gleason, supra*, cases.

In addition to the authorities which we have urged here, we sincerely pray that the Court will consider our Appellants' Brief in the Court below in its entirety. The question of the right of a party to institute a separate and independent action to set aside and vacate a Judgment rendered by a Court without jurisdiction of the subject matter is a most important right which has been established by this Court, which should be maintained for all litigants in view of the importance of obtaining relief from State Court Judgments in both Civil Rights and Labor cases. See *American Federation of Labor vs. Swing, 312 U.S. 715, 61 S. Ct. 568 and 735, 85 L. Ed. 855.*

The decision of the United States District Court is at pages 62-70 of the Appendix. It is unreported.

Respectfully submitted,

Harry H. Peterson

HARRY H. PETERSON
Attorney for Petitioners
738 Midland Bank Bldg.
Minneapolis, Minn. 55401

CERTIFICATE OF COUNSEL

I, Harry H. Peterson, as the attorney for the petitioners do hereby certify that the foregoing Petition is submitted in good faith and believed by him to be meritorious.

Dated: July 19, 1972.

HARRY H. PETERSON
Attorney for Petitioners
738 Midland Bank Bldg.
Minneapolis, Minn. 55401

EXHIBIT I

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1498

Walter A. Anderson, Theodore C. Anderson, David W. Anderson, and Lakeland Development Corporation, and Theodore C. Anderson, as Administrator D.B.N. of the Estate of Eugene Anderson, Deceased,

Plaintiffs-Appellants,

vs.

Lecon Properties, Inc., a Minnesota Corporation,

Defendant-Appellee.

Appeal from an Order of the United States District Court, District of Minnesota.

March 29, 1972.

Before Gibson, Heaney and Ross, Circuit Judges.

Per Curiam.

This is a civil rights action under 42 U.S.C. §1983. The facts of the case are unusual.

The plaintiffs in this case obtained a judgment in the District Court of Anoka County, Minnesota, ordering the defendants to reconvey to them certain property, conditioned upon the plaintiffs' payment or tender of the purchase price, taxes, and certain other expenses; the amount of this payment was approximately $200,000. Judgment was entered on May 26, 1969, and plaintiffs had from six months from the date of

entry of judgment to tender the payment. Plaintiffs filed a post-trial motion for an enlargement of time in which to make the tender, which was denied. Defendants appealed from the judgment and posted a cost bond, but did not post a supersedeas bond; plaintiffs did not appeal. The appeal was still pending in the Minnesota Supreme Court, without having been briefed or argued, when the six months redemption period of the judgment expired. Thereupon the defendants moved for a remand to the District Court for relief from the judgment. The Supreme Court of Minnesota remanded the case with an order providing that both parties "are authorized to seek such relief from the judgment entered herein as they may be advised."

Following the remand, the State trial court on April 21, 1970 entered a new judgment granting the plaintiffs nine months from the date of entry of the judgment or six months from the date of the final termination of an appeal from the new judgment in which to tender the payment. The defendants then filed a petition for a writ of mandamus in the Supreme Court of Minnesota, alleging that under Minnesota law the trial court was without jurisdiction to enter the new judgment and that the Supreme Court's remand was only for the purpose of determining whether the plaintiffs had made the necessary tender under the terms of the original judgment; the proper disposition of this issue would render moot the rest of the appeal.

The Minnesota Supreme Court granted the defendants' petition and issued a writ of mandamus ordering the trial court to vacate its judgment of April 21, 1970; since by that time it was also conceded that the plaintiffs had not made the necessary tender, the Supreme Court also ordered the trial court to enter a judgment quieting defendants' title to the property. It may be noted here that plaintiffs fully participated in all

of these proceedings in the Minnesota state courts. The State trial court promptly complied with the writ of mandamus.

The plaintiffs thereupon instituted this §1983 action in the United States District Court for the District of Minnesota, alleging that the Supreme Court of Minnesota had no jurisdiction to issue the writ of mandamus, and that its actions deprived plaintiffs of property without due process and denied them equal protection under the Fourteenth Amendment. It is not clear from plaintiffs' complaint whether they seek damages from the defendants in the amount of the value of the property, alleged to be $400,000, or whether they seek reinstatement of the state court judgment of April 21, 1970. In any event the District Court held that plaintiffs were entitled to no relief, and we agree.

We think it clear that the federal district court has no jurisdiction in this case. The parties concede that the Minnesota courts had personal jurisdiction over the parties to the action and it is also clear that they had subject matter jurisdiction over the controversy.

The Minnesota Supreme Court has jurisdiction to issue writs of mandamus by virtue of Minn. Stat. §480.04. To the extent that there was any error of constitutional magnitude in the Minnesota Supreme Court's decision, plaintiffs' sole recourse was to the Supreme Court of the United States. Federal courts of inferior jurisdiction have no jurisdiction to review alleged errors in state court judgments. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Evanson v. Northwest Holding Company*, 368 F. 2d 531 (8th Cir. 1966). Moreover, we think the District Court accurately demonstrated that the Minnesota Supreme Court correctly decided this case.

The judgment of the District Court is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

EXHIBIT II

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 71-1498

September Term, 1971

Walter A. Anderson, Theodore C. Anderson, David W. Anderson, and Lakeland Development Corporation, and Theodore C. Anderson, as Administrator D.B.N. of the Estate of Eugene Anderson, Deceased,

Appellants,

vs.

Lecon Properties, Inc., a Minnesota Corporation,

Appellee.

Appeal from the United States District Court for the District of Minnesota.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Minnesota and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

March 29, 1972

Costs taxed in favor of the Appellee:

Cost of printing 25 copies of Appellee's Brief:	$123.33
Total costs of Appellee for recovery from Appellant in the U. S. District Court:	$123.33

EXHIBIT III

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 71-1498

September Term, 1971

Walter R. Anderson, et al.,

Appellants,

vs.

Lecon Properties, Inc., a Minnesota Corporation,

Appellee.

Appeal from the United States District Court for the District of Minnesota.

Motion of appellants for extension of time to April 21, 1972, to file petition for rehearing is granted. The Clerk of this Court is directed to file the previously tendered petition for rehearing. Having been so filed, the petition for rehearing is denied.

April 25, 1972

72-138

Supreme Court, U. S.
FILED
JUL 24 1972
MICHAEL RODAK, JR., CLERK

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Docket No. 71-1498

72-138

WALTER R. ANDERSON, THEODORE C. ANDERSON, DAVID W. ANDERSON, and LAKELAND DEVELOPMENT CORPORATION, and THEODORE C. ANDERSON, as administrator D.B.N. of the estate of EUGENE ANDERSON, deceased,

Plaintiffs-Appellants,

vs.

LECON PROPERTIES, INC., a Minnesota corporation,

Defendant-Appellee.

APPENDIX

HARRY H. PETERSON
Attorney for Plaintiffs-Appellants
738 Midland Bank Building
Minneapolis, Minnesota 55401
335-5254

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-71, Civ. 139

WALTER R. ANDERSON, THEODORE C. ANDERSON, DAVID W. ANDERSON and LAKELAND DEVELOPMENT CORPORATION,

Plaintiffs,

vs.

LECON PROPERTIES, INC., a Minnesota corporation,

Defendant.

COMPLAINT

Now come the plaintiffs and respectfully state and show to the Court:

I.

In this action we shall refer to the plaintiffs and the defendants Lakeland Development Corporation and David W. Anderson, as the Lakeland parties, and to Lecon Properties, Inc. as the defendant.

II.

This is an action to recover a judgment against Lecon for depriving the Lakeland parties of their civil rights under 42 U.S.C.A. Sec. 1953. This Court has jurisdiction to try and decide this action under and pursuant to:

The Fifth Amendment to the Constitution of the United States.

Sec. 1, Fourteenth Amendment to the Constitution of the United States (the equal protection of the laws and due process clauses thereof).

42 U.S.C.A. Sec. 1983.

28 U.S.C.A. Sec. 1343 (3), 2201, 2202, 2281, and 2284 Article 6, Sec. 2 of the Constitution of Minnesota.

M.S.A. Sec. 480.04.

M.S.A. Sec. 586.01.

M.S.A. Sec. 586.11.

III.

The plaintiffs in this action are: Walter R. Anderson, Theodore C. Anderson, David W. Anderson and Lakeland Development Corporation; the plaintiff Walter R. Anderson resides at 3300-32½ Avenue N.E., St. Anthony Village, Hennepin County, Minnesota; the plaintiff Theodore C. Anderson resides at 535 Ballantyne Lane, Spring Lake Park, Anoka County, Minnesota; the plaintiff David W. Anderson resides at 3647 McKinley Street N.E., Minneapolis, Minnesota; and the plaintiff Lakeland Development Corporation has its office c/o Theodore C. Anderson, 535 Ballantyne Lane, Spring Lake Park, Minnesota; the defendant Lecon Properties, Inc. is a corporation organized and existing under and by virtue of the laws of the State of Minnesota and has its offices c/o H. Stanley Wessin, Hamel, Minnesota.

IV.

This is a civil action wherein the Lakeland parties as plaintiffs seek a declaratory judgment against Lecon as follows:

1. That the Writ of mandamus granted and issued by the Supreme Court of Minnesota commanding and compelling the District Court of Anoka County, Minnesota to:

(a) vacate its Order dated April 15, 1970, a copy of which is attached hereto as Exhibit E;

(b) vacate its Amended Judgment entered on April 21, 1970, a copy of which is attached hereto as Exhibit F;

(c) vacate paragraph 1 of the Anoka County Judgment which was originally entered on May 26, 1969, and which provided that the Lakeland parties were entitled to reconveyance from Lecon of the properties therein referred to, as more fully appears from the copy of the said Judgment annexed hereto and marked Exhibit A, and to provide instead of such paragraph, that defendant Lecon Properties, Inc. is entitled to judgment and that the plaintiffs and Lakeland Development Corporation take nothing against Lecon Properties, Inc. and/or Tracts B and C.

(d) vacate and discharge a certain Notice of lis pendens relating to the said Anoka County action dated and recorded on December 2, 1966, in the Office of the Register of Deeds in Anoka County, hereinafter more fully referred to: is null and void for lack of jurisdiction of the Supreme Court of Minnesota to render and grant the same, as is more fully hereinafter set forth.

2. That defendant Lecon, under color of law, including the Constitution, statutes, laws and usages of the State of Minnesota, subjected and caused to be subjected, the Lakeland parties, all within the jurisdiction of the United States, to the deprivation of the rights adjudged in their favor by and in the said Anoka County Judgment, which said rights were secured and guaranteed to them by the Fifth and Fourteenth Amendments to the Constitution of the United States, by depriving said Lakeland parties of equal protection of the laws and due process of law by recovering, obtaining and enforcing the said null and void Writ of mandamus, whereby the Lake-

land parties were deprived of their rights provided for in said Anoka County Judgment.

3. That the Lakeland parties are entitled to recover from Lecon Properties, Inc. damages sustained by them and attorneys fees and costs for the prosecution of this action.

V.

The Lakeland parties recovered the Judgment above referred to in an action in which Theodore C. Anderson and Walter R. Anderson were plaintiffs and Lakeland Development Corporation and David W. Anderson and Lecon Properties, Inc. were defendants in the District Court of Anoka County, Minnesota, File number 27877. A copy of the Findings of Fact and Conclusions of Law by the Court in said case are attached hereto and marked Exhibit B.

VI.

That thereafter, on May 26, 1969, Judgment was duly entered in favor of the said Theodore C. Anderson, Walter R. Anderson, David W. Anderson and Lakeland Development Corporation, a copy of which is attached hereto and marked Exhibit C.

VII.

That on or about August 10, 1969, Lecon took an appeal to the Supreme Court of Minnesota from the said Judgment. That thereafter, although the rules of the Supreme Court of Minnesota require the appellant to file his brief and appendix within 60 days after the Notice of Appeal has been served, the Supreme Court granted to Lecon at least six (6) extensions of time within which to file its brief and appendix, the last of which extensions of time expired more than six (6) months after the Judgment was entered in the District Court of Anoka County as aforesaid.

VIII.

That thereafter the defendant Lecon moved the Supreme Court to remand the case to the District Court of Anoka County for the purpose of enabling Lecon to seek relief in the District Court of Anoka County.

IX.

That thereafter, the Lakeland parties made a similar motion.

X.

That thereafter the Supreme Court of Minnesota made an Order remanding the case from the Supreme Court of Minnesota to the District Court of Anoka County, for the purpose of enabling and permitting the parties hereto to apply to the District Court of Anoka County for such relief as they might be advised. A copy of said Order is attached hereto and marked Exhibit D.

XI.

That upon said remand, the District Court amended its Judgment so as to provide that the Lakeland parties shall have six (6) months from the final disposition of the appeal taken by Lecon referred to in paragraph VII hereof, within which to make tender and payment for the reconveyance of the property referred to in said action. A copy of said Order and the Memorandum of the Court attached thereto are Exhibit E attached hereto.

XII.

That on April 21, 1970, the Amended Judgment referred to herein was entered by the District Court of Anoka County, Minnesota. A copy of said Judgment is attached hereto marked Exhibit F.

XIII.

Paragraph 1 of said Judgment is the part thereof referred to in the Writ of Mandamus in question.

XIV.

That thereafter, and on the date thereof, Lecon filed a Petition in an original proceeding in the Supreme Court of Minnesota for a Writ of mandamus, a copy of which Petition is attached hereto and marked Exhibit G.

XV.

That thereafter the Supreme Court of Minnesota made and filed an Opinion and Order granting the said Writ of mandamus and directing that the same be issued. A copy of said Opinion and Order is attached hereto and marked Exhibit H.

XVI.

That Lecon obtained from the Clerk of the Supreme Court of Minnesota a Writ of mandamus which is null and void for the reasons hereinafter stated, which it served upon the Honorable John F. Thoreen, Judge of the District Court of Anoka County, Minnesota; a copy of said Writ of mandamus, together with the proof of service thereof is attached hereto and marked Exhibit I.

XVII.

That acting pursuant to said Writ of mandamus and upon the assumption that the same had been duly issued, the District Court of Anoka County ordered its Judgment of April 21, 1970, to be vacated and amended, as shown by its Order of October 14, 1970, a copy of which is attached hereto and marked Exhibit J.

XVIII.

That the jurisdiction of the Supreme Court of Minnesota is defined and provided for in Article 6, Section 2 (2 M.S.A. p. 174-175). This section reads as follows:

"The Supreme Court shall consist of one chief justice and six associate judges. It shall have original jurisdiction in such remedial cases as may be prescribed by law, and appellate jurisdiction in all cases, both in law and in equity, but there shall be no trial by jury in said court."

It is settled, as a matter of law, that mandamus is a remedial writ and the jurisdiction of the Supreme Court in mandamus cases shall be prescribed by law.

XIX.

The jurisdiction of the Supreme Court of Minnesota, and in fact of all the Courts of the state, is prescribed by statute, 38 M.S.A. Sec. 586.01 which reads:

"The writ of mandamus may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. It may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, but it cannot control judicial discretion."

Under well settled rules of law, the Supreme Court not only lacks jurisdiction to control judicial discretion, but by the very terms of the cited section, is prohibited from doing so. See Swanson v. Alworth, 159 Minn. 193, 198 N.W. 453.

XX.

The Supreme Court lacked jurisdiction to grant the Writ of mandamus in the instant case by reason of the provisions of the Constitution of Minnesota, Article 6, Section 2 and 38 M.S.A. Sec. 586.01, for the reason that the Writ was granted to control judicial discretion of the District Court of Anoka County and consequently the Writ so granted and issued was utterly null and void and of no legal effect.

XXI.

That by reason of the wrongful acts of Lecon constituting unconstitutional deprivation of the rights of the Lakeland parties aforesaid, the Lakeland parties have been damaged in an amount in excess of $400,000.

II.

That by reason of the allegations aforesaid, the Lakeland parties are entitled to a declaratory judgment declaring and determining the rights of the parties hereto.

WHEREFORE, the Lakeland parties pray judgment as follows:

1. That the Supreme Court of Minnesota lacked jurisdiction to grant the Writ of Mandamus referred to herein.

2. That the Writ of Mandamus heretofore issued by the Supreme Court of Minnesota commanding and directing the District Court of Anoka County:

(a) to vacate the Court's Order of April 15, 1970.

(b) to vacate the Amended Judgment of the District Court of Anoka County entered on April 21, 1970.

(c) to vacate and set aside paragraph 1 of the Judgment of the District Court of Anoka County originally entered on May 26, 1969, and to substitute in lieu thereof a provision to the effect that Lecon is entitled to judgment and that the Lakeland parties take nothing against Lecon and/or Tracts B and C and to vacate the Notice of lis pendens relating to said matter filed in the Office of the Register of Deeds of Anoka County,

is null and void and of no legal effect.

3. That the Lakeland parties are entitled to the Judgment of the District Court of Anoka County entered on May 26, 1969, as amended by the Judgment entered on April 21, 1970, notwithstanding anything contained or provided for in the said Writ of mandamus.

4. That the said Notice of lis pendens, notwithstanding the Writ of mandamus, is in full force and effect.

5. That the Lakeland parties are entitled to reasonable attorneys fees together with their costs and disbursements herein.

HARRY H. PETERSON
Attorney for Plaintiffs
738 Midland Bank Building
Minneapolis, Minnesota 55401
335-5254

EXHIBIT A

JUDGMENT OF DISTRICT COURT OF ANOKA COUNTY IN FAVOR OF APPELLANTS AND AGAINST APPELLEE — FILE NO. 27877

APPELLANTS' EXHIBIT A BELOW.

This action came to trial before the Honorable John F. Thoreen, one of the Judges of this Court, on August 26, 1968. J. Derck Amerman and James L. Wegner appeared as attorneys for the plaintiffs; Jerome B. Pederson appeared as attorney for defendant Lecon Properties, Inc., a Minnesota corporation; Harry H. Peterson appeared as attorney for defendants Lakeland Development Corporation, a Minnesota corporation, and David W. Anderson; Benjamin Drake and John W. Simpson appeared as attorneys for defendant William B. Korstad; the plaintiffs had filed a dismissal as to defendant James E. Anderson. On March 14, 1969, the Court made its Findings of Fact, Conclusions of Law and Order for Judgment.

NOW, THEREFORE, Pursuant to the Conclusions of Law and Order for Judgment, all stays of the entry of judgment having expired;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That defendant Lecon Properties, Inc. shall reconvey their interest in Tract B and Tract C to defendant Lakeland Development Corporation upon tender and payment to Lecon Properties, Inc. by Lakeland Development Corporation of all monies Lecon Properties, Inc. has paid to Lakeland Development Corporation and the fee owners pursuant to the contracts with Lakeland Development Corporation and subsequently with Lecon Properties, Inc. plus the additional amounts Lecon Properties, Inc. has paid for taxes and assessments and plus interest at 6% per annum on all such payments from the date of such payments to the date of tender. Lakeland Development Corporation shall have six months from the date of this Judgment to make such tender and payment; and if Lakeland Development Corporation fails to do so, any claim it may have against Lecon Properties, Inc., and/or said land shall terminate.

2. That the defendant Lakeland Development Corporation have and recover from the defendant William B. Korstad the sum of $17,500.00 together with interest thereon from June 5, 1962, in the amount of $7,315.00, amounting in all to the sum of $24,815.00.

3. That the plaintiffs have and recover from the defendant William B. Korstad their costs and disbursements in the amount of $15.00.

4. That the defendant Lakeland Development Corporation have and recover from the defendant William B. Korstad its costs and disbursements in the amount of $— —.

By Order of the Court:
RAYMOND NILSSON
Clerk of the District Court
Anoka County, Minnesota

Dated at Anoka, Minnesota this 26th day of May, 1969.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT OF ANOKA COUNTY COURT, FILE NO. 27877

APPELLANTS' EXHIBIT B BELOW.

This case came on for trial before the undersigned without a jury on August 26, 1968, at the courthouse at Anoka, Minnesota. Attorneys J. Derck Amerman and James L. Wegner appeared for the plaintiffs. Attorney Harry H. Peterson appeared for defendants Lakeland Development Corporation and David W. Anderson. Attorney Jerome B. Pederson appeared for defendant Lecon Properties, Inc. Attorney Benjamin Drake and John W. Simpson appeared for defendant William B. Korstad. The plaintiffs had filed a dismissal as to defendant James E. Anderson.

After considering the evidence presented and oral and written arguments of counsel (final briefs being submitted on or about November 23, 1968), the Court makes the following Findings of Fact, Conclusions of Law, and Order for Judgment:

FINDINGS OF FACT

1. That Eugene W. Anderson died on March 18, 1960, intestate; that at the time of his death he was divorced from his wife Dagmer J. Anderson and then unmarried; that he left surviving four heirs, i.e. his sons James E., age 26, David W., age 24, Walter R., age 19, and Theodore C., age 17; that the said Dagmer had legal custody of Walter and Theodore.

2. That the said James E. Anderson filed a petition to probate Eugene's estate in the Probate Court of Anoka County, Minnesota, and was appointed administrator on July 27, 1960.

3. That at the time of his death, Eugene owned all of the stock (20 shares) of Lakeland Development Corporation of which he was president and managing officer. That this stock was the sole asset of substantial value in the estate.

4. That the principal assets of Lakeland consisted of interests in tracts of land described as follows:

Tract A. — All that part of Lot 7, auditor's Subdivision No. 152 lying West of the West right of way line of Highway No. 65, Anoka County, Minnesota.

Tract B. — All of that part of Lot 7, Auditor's Subdivision No. 152 that lies East of the East right of way line of Highway No. 65, Anoka County, Minnesota.

Tract C. — All of Lots 8 and 12, Auditor's Subdivision No. 152 except for highway right of way; and Lots 1, 2, 4, 5, 6, 12, 13, 14, 15, 16, 17, 20, 29, 30, 31, 32, 33, 36, 37, 38, 39, 40, and 41 Warren's Addition, Anoka County, Minnesota.

That Tract A consisted of approximately 18 acres; was owned in fee by Lakeland, and was of an estimated value of more than $100,000.00. That Tract B and Tract C consisted of approximately 64 acres. That Lakeland had a contract for deed vendee's interest in Tract B with a balance owing therein

of approximately $42,000.00 and an option to purchase Tract B for $160,000.00. Lakeland could keep the option enforce to March 15, 1963, by paying $500.00 per year on March 15, 1961 and on March 15, 1962.

5. That it is not clear from the corporate minutes of Lakeland and exhibits received who the directors and officers were in 1958, 1959 and prior to March 18, 1960, except that Eugene was a director and president and managing officer. David claimed to be secretary from 1957 to 1960.

6. That a meeting was held on March 23, 1960, at the office of attorney James T. Knutson in Anoka, Minnesota, purporting to be a meeting of both stockholders and directors of Lakeland. Present at this meeting were James, David and James T. Knutson. At this meeting James was elected president and treasurer, David was elected vice-president, and Knutson was elected secretary.

7. That thereafter, James consulted defendant Korstad, an attorney, relative to the development and/or sale of the Lakeland properties. At Korstad's suggestion, the corporate business was taken from attorney Knutson and turned over to Korstad and thereafter he alone advised James in this regard.

8. That on July 29, 1960, upon the advice and at the direction of Korstad, a meeting purporting to be a meeting of shareholders of Lakeland was held at Korstad's office, at which meeting James, as representative of the Estate of Eugene, voted the 20 shares of stock in Lakeland and elected himself, Korstad, and one Lloyd M. Severson directors. Immediately thereafter a special meeting of the directors was held electing James president, Severson vice-president, and Korstad secretary-treasurer. The minutes of this meeting and subsequent minutes dated August 11, September 2, and December

8, 1960, indicate Severson was present but there is no evidence or claim that he actively participated in the operation of the company.

9. That as of July 29, 1960, Korstad was aware of the equitable interest of David, Walter and Theodore Anderson as heirs of Eugene in Lakeland. That David, Walter and Theodore had no notice of the July 29, 1960, meeting.

10. That the July 29 shareholders meeting was held by James and Korstad for the purpose of depriving David, Walter and Theodore of their right to control the management of Lakeland and was in violation of the fiduciary duty James owed his said three brothers as administrator of the estate of Eugene.

11. That on August 11, 1960, James E. Anderson and Korstad signed an agreement prepared by Korstad whereby Korstad would be paid seven percent of the gross sales price received from the sale of land owned by Lakeland. That none of the other brothers knew of this agreement.

12. That in August of 1960 Korstad also represented one H. Stanley Wessin, who, with others, engaged Korstad to incorporate Lecon Properties, Inc. This company was incorporated to purchase and develop land. Korstad in addition to being attorney of Lecon and paid a retainer by it was also its secretary. Korstad along with James negotiated a sale of Lakeland's interest in Tracts B and C with Lecon for $250,000 which represented a net profit of $48,000 to Lakeland. Walter and Theodore had no notice of this sale. James told David of the sale by phone as David was then in military service stationed in Kansas. David disapproved of the sale. James and Korstad proceeded in spite of David's objections and executed an option contract on behalf of Lakeland on September 2,

1960, which was subsequently exercised by Lecon. Lakeland was paid $48,000 of which Korstad received $17,500.

13. That Korstad was not a stockholder of Lecon. That Wessin and his associates had no knowledge of the status of the estate of Eugene Anderson or who the actual owners of Lakeland were and relied upon Korstad as their attorney in connection with their purchase of the land. Lecon took an assignment of the Lakeland contract on Tract B and an assignment of Lakeland's option interest in Tract C. That Lecon has made payments on the contract on Tract B and exercised the option on Tract C and entered into a contract to purchase the same and has made all the required payments thereon. Lecon has also paid all taxes, assessments, etcetera, as required on both Tracts B and C.

14. That though the cash position of Lakeland was not good in August of 1960, the corporation owned Tract A free of mortgage, affording Lakeland ample security for loans if needed, to make contract and option payments on Tracts B and C.

15. That Lecon paid Lakeland $6,000 at the time the option was executed on September 2, 1960, and on the same day James Anderson wrongfully and without authority and without the knowledge of this three brothers, took $1925.00 thereof for his own personal use. That subsequently as additional money was paid by Lecon, he wrongfully took and used Lakeland funds for his own personal use. That Korstad was aware of the fact that James wrongfully took and used Lakeland funds and advised him to execute notes therefore which James did at a later date.

16. That James and Korstad wrongfully and fraudulently consummated the said sale to Lecon for the purpose of making cash paid to Lakeland available to James for his own personal

use and to enable Korstad to collect a fee of $17,500 based on the agreement dated August 11, 1960.

17. That James as Administrator of the Estate of Eugene wrongfully and fraudulently allowed an inventory and appraisal be filed in the estate in which the 20 shares of Lakeland stock was valued at $5,000 which was only a small fraction of its actual value in view of the admitted value of Tract A and the sale of Lakeland's interest in Tracts B and C.

18. That in December, 1960, James with the knowledge of David and upon the advice of Korstad, wrongfully and fraudulently arranged to purchase the 20 shares of stock of Lakeland from the Estate for $7,000.00. The stock was thereafter transferred by James as administrator, with Probate Court approval, to David, and David pursuant to prior agreement then transferred 10 shares of stock back to James. That the $7,000 actually came from Lakeland funds and was used by James as administrator to pay claims against the estate and expenses of administration, including a payment to him of $250.00 for services.

19. That in connection with the transfer of stock, David relied upon the advice and counsel of James and Korstad and further relied on the verbal promise by James that Walter and Theodore would receive their full one-fourth interest when they became of age. That James convinced David that it was essential that their mother, who had legal custody of Walter and Theodore, should have no opportunity to participate in or control the business of Lakeland.

20. That Korstad as attorney for Lakeland and as a director and officer of Lakeland, along with James, acted wrongfully and in violation of his duty and obligation to Walter and Theodore and the corporation as hereinbefore stated.

21. That Walter had no knowledge of the mismanagement of Lakeland and the fraudulent acts of James and Korstad until November, 1962; that Theodore did not have knowledge thereof until the fall of 1963. That their right to relief in this action is not barred by the statute of limitations nor were they guilty of laches.

22. That Walter and Theodore at the time this action was commenced were equitable owners of 50 percent of the stock of Lakeland and entitled to bring this suit in their names on behalf of the corporation.

CONCLUSIONS OF LAW

That the plaintiffs Walter R. Anderson and Theodore C. Anderson and the defendant Lakeland Development Corporation are entitled to a judgment of this Court as follows:

1. Requiring Lecon Properties, Inc. to reconvey their interest in Tract B and Tract C to Lakeland Development Corporation upon tender and payment to Lecon by Lakeland of all monies Lecon has paid to Lakeland and the fee owners pursuant to the contracts with Lakeland and subsequently with Lecon plus the additional amounts Lecon has paid for taxes and assessments and plus interest at six percent per annum on all such payments from the date of such payments to the date of tender. Lakeland shall have six (6) months from the date of entry of judgment herein to make such tender and payment, and if Lakeland fails to do so, any claim it may have against Lecon and/or said land shall terminate.

2. Judgment in Favor of Lakeland Development Corporation against William B. Korstad in the sum of $17,500 plus interest thereon from June 5, 1962.

3. Plaintiffs' and defendant Lakeland's costs and disbursements herein against defendant William B. Korstad.

ORDER FOR JUDGMENT

Let judgment be entered accordingly.

Entry of judgment is stayed for 30 days.

Dated this 14th day of March, 1969.

JOHN F. THOREEN
District Judge

MEMORANDUM

Walter and Theodore, as heirs of Eugene, clearly had the right to sue in equity to impress a constructive trust upon 50 percent of the stock of Lakeland. Borsgard v. Elverum (1957) 248 Minn. 405, 80 N.W. (2d) 604. It is the Court's opinion that under the facts in the instant case they had the right to go one step further and seek recovery of Tracts B and C at the same time. At the time this lawsuit was commenced, Walter and Theodore were not even stockholders of record and they should not be required to wait to be legally adjudged legal owners of the stock before suing for the return to Lakeland of Tracts B and C. They were also faced with the problem of a sale by Lecon to a bonafide purchaser in good faith, which would have precluded the relief they seek. They allege in their Complaint that James would not convey to them the stock to which they were entitled. The Complaint clearly shows the futility of any demand by them that the corporation, then controlled by James and Korstad, start a suit in the name of Lakeland against James, Korstad and Lecon. Thus, strict compliance with Rule 23, Rules of Civil Procedure, should not be required in this action. The suit by Walter and Theodore is in effect a derivative suit by them as equitable stockholders of Lakeland on behalf of said corporation.

It also appears that prior to this trial and as a result of litigation in Hennepin County, see In re: Involuntary Dissolu-

tion of Lakeland Development Corporation, (1967) 277 Minn. 432, 152 N.W. (2d) 758, and in the Probate Court of Anoka County, Estate of Eugene W. Anderson, File No. 6001, see Plaintiff's Exhibit No. 3, a settlement was reached with James, the stock in Lakeland was in effect returned to the new Administrator D.S.N. of the Estate of Eugene, said Administrator was made a party to this action, and a dismissal as to James was filed. None of the parties objected to this dismissal.

It further appears that by the time of trial the position of Lakeland as a party (in view of the change in the control of the corporation) shifted from that of a nominal defendant to an active plaintiff and the new counsel for Lakeland, Mr. Harry H. Peterson, prior to trial, clearly stated his position as a plaintiff insofar as Lecon was concerned and in effect joined with Walter and Theodore in their prayer for relief. Lakeland's separate Answer filed August 22, 1968, admits the allegations in plaintiffs' second Amended Complaint and asserts a cross-complaint against Korstad. Rule 23 cannot bar Lakeland's right to recover.

The issues as finally drawn prior to trial and accordingly litigated by the parties, presented the question of Lakeland's right to recover Tracts B and C and the fee of $17,500 paid to Korstad.

Defendants Lecon and Korstad claim both laches and the statute of limitations as defenses. The evidence does not convince the Court that Walter and Theodore were guilty of laches. Technically the cross-complaint by Lakeland was served upon Korstad more than six years after he received his last payment (June 5, 1962) from Lakeland based on the Lecon sale. However, the Court has found (though the evidence is in conflict) that Theodore was not aware of Korstad's

activities so as to charge him with knowledge of Korstad's wrongful acts until the fall of 1963. Furthermore, Theodore did not become 21 until February 20, 1964. The plaintiffs' second Amended Complaint was served on Korstad on July 15, 1968, within the six-year statutory period.

The evidence clearly establishes the wrongful and fraudulent acts of James as Administrator of the estate of Eugene. While he technically had the right to vote the stock of Lakeland as administrator, M.S.A. 300.57, he is still charged as a fiduciary to act in the best interest of the heirs. 7 Dunnell's Digest, Sec. 3568 (p. 409); Arnold v. Smith (1913) 121 Minn. 116, 140 N.W. 748.

In view of Korstad's knowledge of the rights of Walter and Theodore and his active participation with James in fraudulently and wrongfully depriving them of their right to participate in the control and management of Lakeland, it is the Court's view that he is not entitled to personally benefit from the sale to Lecon and thus must repay his fee of $17,500. 2 Dunnell's Digest, Sec. 700; Faber v. Enkoma (1930) 180 Minn. 493, 231 N.W. 410.

The plaintiffs seek punitive damages from Korstad and also claim the right to recover Tracts B and C without repaying Lecon for the money it has expended. The Court feels that equity will best be served in this case by requiring Korstad to repay his fee to the corporation and permitting Lecon to recover its out of pocket expenditures.

While the Court believes that Lecon is not entitled to the status of a bonafide purchaser in view of the fact that Korstad was its director, officer, and attorney on and prior to September 2, 1960, the actual owners and stockholders of Lecon, i.e. Wessin, George Hanson, and associates, did not

have actual knowledge of the facts concerning the ownership of Lakeland and the wrongful acts of James Anderson.

Dated this 14th day of March, 1969.

JOHN F. THOREEN
District Judge

EXHIBIT C
EXHIBIT C IS THE SAME AS EXHIBIT A

EXHIBIT D

STATE OF MINNESOTA
IN SUPREME COURT

WALTER R. ANDERSON and THEODORE C. ANDERSON, and THEODORE C. ANDERSON as Administrator D.B.N. of the Estate of Eugene W. Anderson,

Plaintiffs-Respondents,

vs. 42065 & 42161

JAMES E. ANDERSON,

Defendant,

LAKELAND DEVELOPMENT CORPORATION, a Minnesota corporation, and DAVID W. ANDERSON,

Defendants-Respondents,

LECON PROPERTIES, INC., a Minnesota corporation,

Defendant-Appellant,

WILLIAM B. KORSTAD,

Defendant-Appellant.

ORDER

Upon the joint motion of plaintiffs and defendants-respondents,

IT IS ORDERED, That this court's order of remand dated January 19, 1970, was and is intended to authorize the district court to grant such relief from the judgment to any parties to the litigation as the facts and law may require or warrant, and accordingly plaintiffs and defendants-respondents, as well as defendants-appellants, are authorized to seek such relief from the judgment entered herein as they may be advised.

Dated: February 17, 1970.

JAMES F. OTIS
Associate Justice

State of Minnesota
County of Anoka

District Court
Tenth Judicial District

WALTER R. ANDERSON and THEODORE C. ANDERSON, and THEODORE C. ANDERSON as Administrator D.B.N. of the Estate of Eugene W. Anderson,

Plaintiffs,

vs.

JAMES E. ANDERSON, LAKELAND DEVELOPMENT CORPORATION, a Minnesota corporation, LECON PROPERTIES, INC., a Minnesota corporation, DAVID W. ANDERSON, and WILLIAM B. KORSTAD,

Defendants.

EXHIBIT E

ORDER

Judgment was entered in this case by this Court on May 26, 1969. Defendant Lecon Properties, Inc. and defendant William B. Korstad appealed from the judgment and the District Court file was duly transmitted to the Clerk of the Supreme Court. That thereafter Lecon moved the Supreme Court for an order remanding the case to the District Court for purposes of enabling Lecon to move the District Court for relief from the said judgment. The Supreme Court ordered the case remanded on January 19, 1970, and pursuant thereto Lecon moved this Court for relief from said judgment which said motion was heard at Stillwater, Minnesota, on January 30, 1970. Attorney Jerome B. Pederson appeared for Lecon, attorney Harry H. Peterson appeared for the plaintiffs, and the defendants Lakeland Development Corporation and David W. Anderson in opposition thereto. There was no appearance by the defendant William B. Korstad. This motion was argued orally and written memorandums were also submitted to the Court. The matter was taken under advisement.

Thereafter, on February 17, 1970, the Supreme Court filed another Order expanding its Order of January 19, 1970, and pursuant thereto the plaintiffs and the defendants Lakeland Development Corporation and David W. Anderson moved this Court for relief from the judgment, said motion being heard at Stillwater, Minnesota, on March 12, 1970. Attorney Harry H. Peterson appeared for the moving parties, Attorney James L. Baillie appeared for Lecon, and Attorney Wayne Pokorny appeared for Korstad. This motion was argued orally and additional written memorandums were submitted to the Court.

Mr. Pokorny requested that Korstad be permitted to also move the Court for relief from the judgment pursuant to the February 17, 1970, Order of the Supreme Court. It was agreed that Korstad would have until March 19, 1970, to file a motion together with affidavits and a memorandum in support of said motion and that oral argument on such motion would be waived. It was further agreed that the other parties would have until March 26, 1970, to file affidavits and/or memorandums in opposition to Korstad's motion. The defendant Korstad did file such a motion and brief with the Court and the same has been duly considered as well as additional briefs filed thereafter by all parties.

It was stipulated and agreed at the March 12, 1970, hearing that no payments or tender thereof have been made by Lakeland to Lecon and the Court finds such to be the fact.

After considering the arguments of counsel and all the files and records herein,

IT IS HEREBY ORDERED:

(1) That the motion of defendant Lecon is denied.

(2) That the motion of defendant Korstad is denied.

(3) That the motion of plaintiffs and defendants Lakeland Development Corporation and David W. Anderson is denied in part and granted in part and that the last sentence of Paragraph I of the "Conclusions of Law" made in this case on March 14, and filed March 17, 1969, be and hereby is amended to read as follows:

> "Lakeland shall have nine (9) months from the date of entry of judgment herein, or in the event there is an appeal to the Supreme Court by Lecon, six (6) months after final determination by the Supreme Court, to make such tender and payment, and if Lakeland fails to do so, any claim it may have against Lecon and/or said land shall terminate."

IT IS FURTHER ORDERED:

That the Clerk amend the Judgment in this case dated and filed May 26, 1969, accordingly.

* * * * * * * *

Dated this 13th day of April, 1970.

JOHN F. THOREEN
District Judge

MEMORANDUM

It was the original intention of the Court to give Lakeland a reasonable opportunity to pay back Lecon and thus regain its lands. The Court now realizes that the time limit of six months after judgment was not reasonable even though Lecon had not appealed because of the uncertainty of title for the first three months in which an appeal could have been taken. Lakeland's financial position was such that it would have to use its equity in the land in question to finance repayment to Lecon.

The Court feels it has the power under Rule 60.02 to amend its original "conclusions" to give Lakeland six months after final determination by the Supreme Court to pay Lecon. This will make it unnecessary to rule on the more technical question of whether or not Lecon's appeal extended Lakeland's time to tender or repay Lecon.

The Court is not ignoring Korstad's request for a fu-ther hearing and an opportunity for oral argument before this Court. However, he had ample time to file his motion prior to March 12, 1970, the hearing date on the plaintiff's motion which was the *second hearing* held by the Court on this matter. The Court does not feel justified in further delaying decision on these motions.

Korstad's request for a new trial based on newly discovered evidence is not justified as the deposition of David Anderson taken August 15, 1968 (as claimed in his memorandum) and all other testimony presented in the case of "In the matter of Involuntary Dissolution of Lakeland Development Corporation, (1967) 277 Minn. 432" were known to him or should have been known to him before the trial of the instant case on August 26, 1968.

The Court is also mindful of Lecon's argument that because of the delay in final decision that has resulted from the remands, additional hearings in the Supreme Court, additional hearings and time for briefs in this court, that it is being penalized financially and should now be protected by further amending the Findings to provide for a sale of the parties equity now pending final disposition by the Supreme Court.

However, if Lecon's basic argument is correct, i.e. that plaintiffs' rights are gone because of their failure to tender and that this Court has no authority or jurisdiction to amend its original Findings pursuant to the February 17, 1970, Order of the Supreme Court, it should now be in a position to have these issues determined finally by the Supreme Court and obtain the relief it seeks.

April 13, 1970.

JOHN F. THOREEN
District Judge

EXHIBIT F

AMENDED JUDGMENT OF THE DISTRICT COURT OF ANOKA COUNTY. FILE NO. 27877

APPELLANTS' EXHIBIT F BELOW

This action came to trial before the Honorable John F. Thoreen, one of the Judges of this Court, on August 26, 1968. J. Derck Amerman and James L. Wegner appeared as attorney for the plaintiffs; Jerome B. Pederson appeared as attorney for defendant Lecon Properties, Inc., a Minnesota corporation; Harry H. Peterson appeared as attorney for defendants Lakeland Development Corporation, a Minnesota corporation, and David W. Anderson; Benjamin Drake and John W. Simpson appeared as attorneys for defendant William B. Korstad; the plaintiffs had filed a dismissal as to defendant James E. Anderson. On March 14, 1969, the Court made its Findings of Fact, Conclusions of Law and Order for Judgment, and Judgment was entered on May 26, 1969. On April 13, 1970, the Court made its Order for Amended Judgment.

NOW, THEREFORE, Pursuant to the Conclusions of Law and Order for Judgment, and Order for Amended Judgment;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That defendant Lecon Properties, Inc., shall reconvey their interest in Tract B and Tract C to defendant Lakeland Development Corporation upon tender and payment to Lecon Properties, Inc., by Lakeland Development Corporation of all monies Lecon Properties, Inc., has paid to Lakeland Development Corporation and the fee owners pursuant to the contracts

with Lakeland Development Corporation and subsequently with Lecon Properties, Inc., plus the additional amounts Lecon Properties, Inc., has paid for taxes and assessments and plus interest at 6% per annum on all such payments from the date of such payments to the date of tender. Lakeland Development Corporation shall have nine (9) months from the date of entry of Judgment herein, or in the event there is an appeal to the Supreme Court by Lecon Properties, Inc., six (6) months after final determination by the Supreme Court, to make such tender and payment, and if Lakeland Development Corporation fails to do so, any claim it may have against Lecon Properties, Inc., and/or said land shall terminate.

2. That the defendant Lakeland Development Corporation have and recover from the defendant William B. Korstad the sum of $17,500.00, together with interest thereon from June 5, 1962, in the amount of $7,315.00, amounting in all to the sum of $24,815.00.

3. That the plaintiffs have and recover from the defendant William B. Korstad their costs and disbursements in the amount of $15.00.

4. That the defendant Lakeland Development Corporation have and recover from the defendant William B. Korstad its costs and disbursements in the amount of $——.

By Order of the Court:
RAYMOND NILSSON
Clerk of District Court,
Anoka County, Minnesota

Dated at Anoka, Minnesota, April 21, 1970.

(State of Minnesota, County of Anoka — Certified to be a true and correct copy of the original of file and of record in my office. — May 1, 1970 — Raymond Nilsson, Clerk of District Court, by Pamela L. Bodley, Deputy.)

EXHIBIT G

No. 42065
No. 42161
STATE OF MINNESOTA
IN SUPREME COURT

WALTER R. ANDERSON and THEODORE C. ANDERSON, and THEODORE C. ANDERSON as Administrator D.B.N. of the Estate of Eugene W. Anderson,

Plaintiffs-Respondents,

vs.

JAMES E. ANDERSON,

Defendant,

LAKELAND DEVELOPMENT CORPORATION, a Minnesota corporation, and DAVID W. ANDERSON,

Defendants-Respondents,

LECON PROPERTIES, INC., a Minnesota corporation,

Defendant-Appellant,

WILLIAM B. KORSTAD,

Defendant-Appellant.

PETITION FOR WRIT OF MANDAMUS

To: The Supreme Court of the State of Minnesota

The Petitioner, Lecon Properties, Inc. (Lecon), through Fredrikson, Byron & Colborn, its undersigned attorneys, requests a writ of mandamus on the following grounds:

1. This action came on for trial on August 26, 1968, in the District Court, County of Anoka, Tenth Judicial District (District Court), before the Honorable John F. Thoreen without a jury. Insofar as Lecon was concerned, the action involved purported claims against a vendee's interest in Tracts B and C of certain real estate which interests had been sold by Lakeland Development Corporation (Lakeland) to Lecon.

2. Lecon had entered into the option contract with Lakeland on September 2, 1960, wherein Lecon was granted an option, exercisable on or before June 1, 1961, to purchase Lakeland's interest in Tracts B and C for the sum of $250,000. The uncontradicted testimony at the trial established that the option price was fair and reasonable.

3. Lecon exercised its rights under the option and in due course paid to Lakeland the sum of $48,000, which sum represented Lakeland's gross profit on the transaction. Lecon then entered into contracts with the fee owners and has been purchasing the property as vendee. The first summons and complaint in connection with this action was served on December 14, 1966, and Lecon was not served until January 18, 1967. However, during the long period of time between knowledge of the sale by the plaintiffs and any action regarding it, Lecon not only paid the sum of $48,000 to Lakeland but paid substantial sums to the fee owner of the property and for taxes and special assessments as hereinafter specifically set forth.

4. Although the trial was completed on August 30, 1969, the Findings of Fact, Conclusions of Law and Order for Judgment were not completed until March 14, 1969. During this period, Lecon continued to make the payments on the property.

5. The trial was completed on August 30, 1969, and on March 14, 1969, Judge Thoreen issued Findings of Fact, Conclusions of Law and Order for Judgment, and pursuant there-

to, on May 26, 1969, judgment was entered, adjudging and decreeing, insofar as any relief against Lecon is concerned, as follows:

> "That defendant Lecon Properties, Inc. shall reconvey their interest in Tract B and Tract C to defendant Lakeland Development Corporation upon tender and payment to Lecon Properties, Inc. by Lakeland Development Corporation of all monies Lecon Properties, Inc. has paid to Lakeland Development Corporation and the fee owners pursuant to the contracts with Lakeland Development Corporation and subsequently with Lecon Properties, Inc. plus the additional amounts Lecon Properties, Inc. has paid for taxes and assessments and plus interest at 6% per annum on all such payments from the date of such payments to the date of tender. *Lakeland Development Corporation shall have six months from the date of this judgment to make such tender and payment; and if Lakeland Development Corporation fails to do so, any claim it may have against Lecon Properties, Inc. and/or said land shall terminate.*" Emphasis supplied. (A copy of said judgment is attached hereto, marked Exhibit "A" and made a part hereof.)

6. On April 2, 1969, Lecon, pursuant to Rule 52.02 and 59.01, noticed for hearing a post trial motion for amended Findings in its favor or in the alternative for a new trial.

7. On or about April 3, 1969, the plaintiffs, pursuant to Rule 52.02, noticed for hearing a post trial motion seeking an amendment to the Findings and Conclusions of Law to permit Lakeland twelve (12) months after the entry of judgment in which to make the tender and payment to Lecon or, in the event of appeal, twelve (12) months from the date of final determination by the Minnesota Supreme Court. The defen-

dants Lakeland and David W. Anderson joined in this post trial motion.

8. On May 9, 1969, the District Court issued its order denying each of the foregoing post trial motions. (A copy of this order is attached hereto as Exhibit "B".) On May 26, 1969, judgment was entered.

9. The time for taking appeals was due to expire *prior* to the expiration of the six (6) month period during which tender and payment was to be made to Lecon by Lakeland. Thus, Lecon had no alternative but to preserve its right of appeal prior to the expiration of such six (6) month period. Lecon duly served and filed its notice of appeal from the order of the District Court denying its post trial motion for amended Findings or in the alternative for a new trial, and from the judgment.

10. The defendant, William B. Korstad (Korstad), duly served and filed a separate notice of appeal from the money judgment rendered against him in this action and duly filed his supersedeas bond conditioned upon his payment of the money judgment or that part of the money judgment which is affirmed against him.

11. No party, other than Lecon, has appealed from the judgment against Lecon or from any orders with respect to that portion of the judgment against Lecon, and no supersedeas bond has been filed with respect to the portion of the judgment against Lecon.

12. The six (6) month period provided in paragraph 1 of the judgment expired on November 27, 1969, and it is conceded by all parties that no tender and payment was made.

13. On or about December 8, 1969, James L. Wegner, Esq. and J. Derck Amerman, Esq. withdrew as attorneys for the plaintiffs respondents, and Harry H. Peterson, Esq. then as-

sumed the representation of all plaintiffs-respondents in addition to his representation of the defendants-respondents, Lakeland and David W. Anderson.

14. Although Lakeland's interest, if any, if the real estate in question terminated on November 27, 1969, in accordance with the plain language of paragraph 1 of the judgment, the judgment in its present form has a practical and legal effect of placing a cloud on Lecon's interest in the real estate because there is nothing of record indicating that Lakeland failed to make the required tender and payment within six (6) months from the date of the judgment. Also, there remains on record a notice of lis pendens filed in connection with this action. Thus, it became necessary for Lecon to seek the appropriate relief *from* the effect of paragraph 1 of the judgment and the notice of lis pendens.

15. It was necessary for Lecon to seek the appropriate relief from paragraph 1 of the judgment and the notice of lis pendens *only* for the purpose of clearing the cloud on the title to Tracts B and C. At this point, Lecon had several alternatives. Lecon was free to commence an action to register the property, to commence a separate action for quieting the title, or to seek the appropriate relief by making application therefor to the District Court pursuant to Rule 60.02(5) of the Minnesota Rules of Civil Procedure. The first two alternatives were rejected primarily for the reason that the procedures involved would have been more complex and time consuming. It was decided that the simplest and quickest way to resolve this matter was for Lecon to take the necessary steps to enable it to make an application to the District Court for relief from the judgment and the notice of lis pendens pursuant to Rule 60.02(5) and that subsequent to obtaining such release, Lecon would dismiss its appeal pending before this Court on

the grounds that the issues involved have been rendered mute.

16. Lecon's appellant brief was not due until December 12, 1969, due to a delay in the preparation of the transcript, and thus an extension of time for filing the same was obtained and on December 30, 1969, Lecon submitted a motion to this Court for an order remanding this action to the District Court for the purpose of enabling it to seek an order relieving it from the effect of the judgment. The said motion clearly indicated that upon such remand, Lecon intended to make a motion to the District Court pursuant to Rule 60.02(5) for an order dismissing paragraph 1 of the said judgment.

17. Lecon's said motion for remand was vigorously contested by the plaintiffs and defendants-respondents on the *sole ground* that Lecon's appeal in and of itself stayed the running of the six (6) month period under the judgment. This issue was fully briefed to this Court.

18. On January 19, 1970, this Court, by the Honorable Justice James C. Otis, granted Lecon's motion and remanded this action to the District Court "to enable defendant Lecon to make, and the Court to hear, a motion for relief from the judgment entered herein."

19. Upon such remand, Lecon made a motion to the District Court pursuant to Rule 60.02(5) for relief *from* the judgment and also for discharge of the lis pendens. A copy of this motion is attached hereto as Exhibit "C". The motion was heard on January 30, 1970. Opposing counsel, during oral argument, acknowledged on the record that Lakeland had not made the tender and payment required by the judgment but requested the opportunity to brief the issue of whether Lecon's appeal, in and of itself, operated as a stay of the six (6) month period under the judgment. The District Court granted such

request in spite of Lecon's argument that this Court had already decided this question when it granted the remand.

20. Harry H. Peterson, Esq., on February 3, 1970, moved this Court for an order which would enable the plaintiffs and defendants-respondents, upon remand, to make a motion "for such relief from the judgment entered herein as they may be advised to make." On February 17, 1970, this Court issued another order which stated that the earlier order of remand "was and is intended to authorize the district court to grant such relief *from* the judgment to any parties to the litigation *as the facts and law may require or warrant.*" Emphasis supplied.

21. On February 27, 1970, Judge Thoreen informed Jerome B. Pederson, one of the undersigned attorneys for Lecon, that he intended to deny Lecon's motion for relief from the judgment on the grounds that this Court's order remanding the case did not state whether it had decided the issue of whether Lecon's appeal stayed the running of the six (6) month period under the judgment and that he would refuse to decide such issue. Judge Thoreen indicated that he would issue such an order within a few days.

22. On March 4, 1970, Harry H. Peterson, Esq., on behalf of the plaintiffs and defendants-respondents, served a motion returnable before the District Court on March 12, 1970, a copy of which is attached hereto as Exhibit "D". This motion which was described as a "motion to *amend* Conclusions of Law and judgment and in the alternative for other relief", can only be construed as a Rule 52.02 motion for amended Findings and Conclusions of Law. The motion did not seek relief *from* the judgment. Quite the contrary. The motion sought to *amend* the Conclusions of Law and the judgment so as to completely change the relief granted on the grounds that it is contrary

to the evidence and the law. Since the motion was really a Rule 52.02 motion, it was clearly untimely because it was not made within the time allowed for a motion for a new trial pursuant to Rule 59.03.

23. Because Lecon firmly believed that the District Court should have granted its motion for relief from the judgment and because Lecon firmly believed that the District Court could not entertain a Rule 52.02 motion (the motion was untimely and by reason thereof, the District Court would be without jurisdiction to hear the same and the motion was beyond the scope of the remand), it submitted, on March 9, 1970, a petition to this Court for a peremptory writ of mandamus in this action, directing the District Court to grant its motion and for a writ of prohibition restraining the District Court from considering the Rule 52.02 motion on behalf of the plaintiffs and defendants-respondents. This Court declined to issue any writs prior to the rulings by the District Court, although the Court did indicate that Lecon was free to bring the matter to its attention after the rulings by the District Court if the relief was still desired.

24. At the time of the hearing in the District Court on March 12, 1970, without either prior service or proper service under the Rules of Civil Procedure, Harry H. Peterson, Esq. purported to serve upon the attorneys for Lecon an amended motion. A copy of this amended motion is attached hereto as Exhibit "E". The amended motion is identical in substance with the motion served on March 4, 1970 (Exhibit D), with the exception that it specifically purports to now be a motion pursuant to Rule 62.02 and uses the word "modify" rather than "amend". The belated change was an obvious attempt to change the motion into one which would be within the scope of the remand. However, merely calling a motion a Rule 60.02

motion does not make it one and the attempted amendment of the motion should have been ignored by the District Court.

25. On April 15, 1970, the District Court, by the Honorable John F. Thoreen, filed its order denying Lecon's motion for relief from the judgment and granting the motion of the plaintiffs and defendants-respondents in part, by providing that the last sentence of paragraph 1 of the Conclusions of Law made in this case on March 14 and filed on March 17, 1969, be amended to read as follows:

> "Lakeland shall have nine (9) months from the date of entry of judgment herein, or in the event there is an appeal to the Supreme Court by Lecon, six (6) months after final determination by the Supreme Court, to make such tender and payment, and if Lakeland fails to do so, any claim it may have against Lecon and/or said land shall terminate."

It was further ordered that the clerk amend the judgment in this case dated and filed May 26, 1969, in accordance with such order and, accordingly, an amended judgment in this case was duly entered by the clerk of District Court on April 21, 1970. A copy of the District Court's order and memorandum is attached hereto as Exhibit "F".

26. The District Court, in denying Lecon's motion, refused to exercise its powers in a way which was required by the remand of this Court, the applicable Rules of Civil Procedure, and the undisputed facts in this case in the following respects:

a. It is undisputed that the so-called six (6) month redemption period specified in the judgment expired without payment or tender of payment by Lakeland to Lecon and that Lakeland's interests in the property thereby terminated according to the judgment.

b. Lecon's motion for relief from the judgment was necessary *only* to clear the cloud on title which had been placed on the property by the form of the judgment and the notice of lis pendens. Lecon was truly seeking relief *from* the judgment. Lecon, for the purposes of its motion, was willing to accept the District Court's Conclusions of Law. However, because payment was not made within the six (6) month period (an event which the District Court and the parties clearly contemplated as a possibility at the time the judgment was entered), the judgment had been satisfied and released in effect and it would be inequitable for the judgment in its form to have prospective application, namely, to cloud title to the property. Thus, Lecon's motion clearly fell within Rule 60.02(5).

27. The District Court, by granting in part the motion of the plaintiffs and defendants-respondents and by ordering the entry of an amended judgment, exceeded its jurisdiction under the Rules of Civil Procedure, acted beyond the scope of this Court's remand and otherwise acted in an arbitrary and capricious manner in the following respects:

a. The said motion, although not labeled as such, was clearly a Rule 52.02 motion for amended findings and conclusions of law. This motion had been previously made as a post trial motion and was denied by the District Court. For this reason alone, the District Court should have denied the motion upon the remand of this case. Most importantly, however, the District Court did not have jurisdiction to entertain such a motion. Rule 52.02 specifically provides that such a motion must be made "not later than the time allowed for a motion for a new trial pursuant to 59.03". It goes without saying that the time specified by Rule 59.03 has long since expired.

b. The motion is clearly beyond the scope of the remand of this case. Even construing this Court's second order of re-

mand liberally, it provides for a remand so that any party can make a motion for "relief *from* the judgment . . . as the *facts and law* may require or warrant" and does not contemplate nor authorize the making of post trial motions which would otherwise be untimely under the Rules of Civil Procedure. The completely unauthorized service and amendment of the motion at the time of the hearing before the District Court clearly indicates an attempt to come within the scope of this Court's remand.

c. Even if the motion were to be construed as a Rule 62.02 motion, the District Court acted in an arbitrary and capricious manner by permitting in effect the use of such rule as a substitute for an appeal or as a means of otherwise superseding the normal and ordinary channels for relief in cases of this kind.

d. Under the circumstances of this case, the order opening and amending the judgment was arbitrary and capricious. Nothing transpired during the six (6) month period which the District Court and the parties did not contemplate at the time the original judgment was entered. The District Court purported to change its conclusions of law in the absence of any showing of a change in circumstances pertaining to the plaintiffs and defendants-respondents, whereas the circumstances pertaining to Lecon had changed materially. Lecon had continued to make payments on the property as will be shown in paragraph 28 hereof. Furthermore, the relationship between the parties had changed. Lakeland, under the judgment, lost its interest, if any, in the property.

28. In order for Lecon to obtain marketable title to the property in question, the relief requested from the District Court must be granted. At this point, Lecon's dilemma is complete. Lecon does not have a plain, speedy and adequate remedy at law for the following reasons:

a. Lecon does not own the fee to Tracts B and C in question but has only a vendee's interest which can be cancelled upon thirty (30) days' notice. Lecon's total investment in the property to date, including taxes and special assessments, is $244,356.64, which sum includes the $48,000 paid by Lecon to Lakeland. The monthly contract payment to the fee owners is $1,500, due on the first of each and every month, and Lecon has not paid such payments for the months of March and April of 1970. It is not foreseeable that Lecon will be able, because of its financial condition, to continue to make such payments to the fee owner for any appreciable length of time. Furthermore, the taxes in the sum of $8,149.50 will be due and payable on May 31, 1970. Lecon may be able to borrow the funds necessary to pay such taxes but because of its financial condition, it is not foreseeable that it will be able to borrow the necessary funds to pay the second half tax payment. In any event, Lecon will not be able to borrow sufficient funds at this time to pay the taxes and bring the contract for deed payments to a current status. Lecon, therefore, must have a resolution of this case as soon as possible or it faces the loss of its investment without any recourse whatsoever against the plaintiffs and defendants-respondents. At this point, it is the plaintiffs and the defendant-respondents who have everything to gain and nothing to lose.

b. If the propriety of the District Court's action in opening the judgment is not decided by this Court, Lecon can never be assured when the judgment in this case will be a final judgment. Moreover, the last paragraph of the District Court's memorandum (Exhibit F) contemplates a speedy determination by this Court of the narrow issues involved.

c. Lecon should not be required to pursue its appeal from the original judgment when the issues raised by this petition

are narrow and a decision can be reached in a relatively short period of time which is likely to dispose of the case. The issues presented are important to the development of the law as well as to the determination of this case in a manner which minimizes the burden of Lecon and this Court.

d. If Lecon is forced to proceed with its appeal from the original judgment and to take an appeal from the District Court's order entered on April 15, 1970 and the amended judgment entered pursuant thereto, it would have no protection in the event it ultimately prevails in this Court but loses its investment in the property. The plaintiffs and defendants-respondents have not filed any bond nor are they required to make the contract for deed payments and pay the taxes during the pendancy of any appeal. They have not appealed; thus, Lecon is truly being penalized by the District Court's action. In this regard, it is submitted that in the event this Court chose not to exercise its discretion and denies Lecon's petition, it should exercise its broad constitutional powers not limited by the Rules of Civil Appellate Procedure and broadly construe Rule 108.06 and enter an order requiring that the property in question be sold under the following conditions. Lecon would be authorized to sell the property for $500,000 net to seller after payment of all costs related to such sale and the special assessments against the property. As an alternative, Lecon would have the property appraised by a qualified appraiser within thirty (30) days and would then place the property on the market for sale at a sum equal to or greater than the appraised market value. In the event a willing buyer is found, all parties would be required to execute whatever documents are necessary to make the title marketable. Upon the closing of such sale, Lecon would be paid the sums to which it is entitled under the judgment and the net proceeds from

the sale after payment of commissions and expenses would be placed in escrow pending the determination of any motions, petitions or appeals in this Court.

WHEREFORE, the Petitioner Lecon prays for a peremptory writ of mandamus granting the relief requested of the District Court by Lecon and ordering the District Court to vacate its order entered on April 15, 1970 and the amended judgment entered on April 21, 1970, and for such other and further relief as may be appropriate in the premises.

Dated: 4-29-70.

FREDRIKSON, BYRON & COLBORN
By Jerome B. Pederson
Attorneys for Lecon Properties, Inc.
1460 Northwestern Bank Building
Minneapolis, Minnesota 55402
339-8331

JUDGMENT (ANOKA COUNTY NO. 27877)
EXHIBIT A FOR THE PETITION

This action came to trial before the Honorable John F. Thoreen, one of the Judges of this Court, on August 26, 1968. J. Derck Amerman and James L. Wegner appeared as attorneys for the plaintiffs; Jerome B. Pederson appeared as attorney for defendant Lecon Properties, Inc., a Minnesota corporation; Harry H. Peterson appeared as attorney for defendants Lakeland Development Corporation, a Minnesota cor-

poration, and David W. Anderson; Benjamin Drake and John W. Simpson appeared as attorneys for defendant William B. Korstad; the plaintiffs had filed a dismissal as to defendant James E. Anderson. On March 14, 1969, the Court made its Findings of Fact, Conclusions of Law and Order for Judgment.

NOW, THEREFORE, Pursuant to the Conclusions of Law and Order for Judgment, all stays of the entry of judgment having expired;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That defendant Lecon Properties, Inc. shall reconvey their interest in Tract B and Tract C to defendant Lakeland Development Corporation upon tender and payment to Lecon Properties, Inc. by Lakeland Development Corporation of all monies Lecon Properties, Inc. has paid to Lakeland Development Corporation and the fee owners pursuant to the contracts with Lakeland Development Corporation and subsequently with Lecon Properties, Inc. plus the additional amounts Lecon Properties, Inc. has paid for taxes and assessments and plus interest at 6% per annum on all such payments from the date of such payments to the date of tender. Lakeland Development Corporation shall have six months from the date of this Judgment to make such tender and payment; and if Lakeland Development Corporation fails to do so, any claim it may have against Lecon Properties, Inc. and/or said land shall terminate.

2. That the defendant Lakeland Development Corporation have and recover from the defendant William B. Korstad the sum of $17,500.00 together with interest thereon from June 5, 1962, in the amount of $7,315.00, amounting in all to the sum of $24,815.00.

3. That the plaintiffs have and recover from the defendant William B. Korstad their costs and disbursements in the amount of $15.00.

4. That the defendant Lakeland Development Corporation have and recover from the defendant William B. Korstad its costs and disbursements in the amount of $——.

By Order of the Court:
RAYMOND NILSSON
Clerk of the District Court
Anoka County, Minnesota

Dated at Anoka, Minnesota this 26th day of May, 1969.

ORDER ON MOTION FOR AMENDED FINDINGS AND CONCLUSIONS (ANOKA COUNTY NO. 27877) WHICH IS EXHIBIT B FOR PETITION.

The following motions were heard on April 22, 1969, at the court house in Center City, Minnesota, by agreement and arrangement between the Court and counsel.

1. Motion by Lecon Properties, Inc., for amended findings or for a new trial.

2. Motion by William B. Korstad for amended findings or for a new trial.

3. Motion by plaintiffs for amended conclusions of law.

Defendants Lakeland Development Corporation and David W. Anderson joined with plaintiffs in this motion.

Attorney Jerome B. Pederson appeared for Lecon Properties, Inc., Attorneys Benjamin Drake and John W. Simpson appeared for defendant William B. Korstad. Attorney James L. Wegner appeared for plaintiffs. Attorney Harry H. Peter-

son appeared for defendants Lakeland Development Corporation and David W. Anderson.

The Court after considering arguments of counsel and memorandums submitted, makes the following ORDER:

Each of said motions is hereby in all things denied.

Entry of judgment is stayed for 15 days.

* * * * *

Dated this 7th day of May, 1969.

JOHN F. THOREEN
District Judge

NOTICE OF MOTION BY APPELLEE FOR RELIEF FROM JUDGMENT

EXHIBIT C FOR THE PETITION

To: Walter R. Anderson and Theodore C. Anderson, and Theodore C. Anderson, as Administrator, D.B.N. of the Estate of Eugene W. Anderson, Plaintiffs; Lakeland Development Corporation, a Minnesota corporation, and David W. Anderson, defendants, and Harry H. Peterson, Esq., their attorney; William B. Korstad, defendant, and Wayne A. Pokorny, Esq., his attorney.

PLEASE TAKE NOTICE that on the 30th day of January, 1970, at 1:30 p.m., or as soon thereafter as counsel can be heard, in the Washington County Courthouse, in Stillwater, Minnesota the defendant, Lecon Properties, Inc., through its undersigned attorneys, will move the Court pursuant to Rule 60.02 of the Minnesota Rules of Civil Procedure for an Order vacating and setting aside Paragraph 1 of the Judgment which was entered herein on May 26, 1969, and ordering that in lieu

thereof Lecon Properties, Inc. is entitled to judgment and that the plaintiffs and Lakeland Development Corporation take nothing against Lecon Properties, Inc. and/or Tracts B and C, and for an Order discharging that certain notice of Lis Pendens filed in connection with this action in the office of the Register of Deeds in Anoka County, Minnesota as Document No. 293411.

The foregoing Motion will be made on all the files and proceedings herein, the affidavits attached hereto, and the Order of the Minnesota Supreme Court remanding this action to this Court for the purpose of making such Motion.

Dated: 1-22-70.

FREDRIKSON, BYRON & COLBORN
By Jerome B. Pederson
1460 Northwestern Bank Building
Minneapolis, Minnesota 55402
339-8331
Attorneys for Defendant, Lecon Properties, Inc.

AFFIDAVIT OF H. STANLEY WESSIN

State of Minnesota
County of Hennepin—ss.

H. Stanley Wessin, being first duly sworn, deposes and says that:

1. He is the President of Lecon Properties, Inc., a Minnesota corporation, the defendant-appellant in the above-entitled action.

2. No tender or payment of any of the monies set forth in paragraph 1 of the judgment entered herein has been made to Lecon Properties, Inc. either by Lakeland Development Corporation or by any other person, natural or corporate.

H. STANLEY WESSIN

Subscribed and sworn to before me this 22nd day of January, 1970. — Jerome B. Pederson, Notary Public.

AFFIDAVIT OF JEROME B. PEDERSON

State of Minnesota
County of Hennepin—ss.

Jerome B. Pederson, being first duly sworn, deposes and says that:

1. He is one of the attorneys for the defendant, Lecon Properties, Inc.

2. No tender or payment of any of the monies set forth in paragraph 1 of the judgment entered herein has been made to Lecon Properties, Inc. either by Lakeland Development Corporation or by any other person, natural or corporate.

3. Paragraph 1 of the judgment entered herein constitutes a cloud on the title to Tracts B and C because there is nothing of record to indicate that Lakeland Development Corporation failed to make the required tender and payment to Lecon Properties, Inc.

4. A notice of lis pendens dated December 2, 1966, relating to this action was recorded on December 2, 1966, in the office of the Register of Deeds in Anoka County, Minnesota, as Document No. 293411.

5. In order to secure relief from paragraph 1 of the judgment entered herein, Lecon Properties, Inc. moved the Minne-

sota Supreme Court for an order remanding the case to the District Court, and a copy of said motion is attached hereto, marked Exhibit A and made a part hereof.

JEROME B. PEDERSON

Subscribed and sworn to before me this 22nd day of January, 1970. — Dianne S. Maciosek, Notary Public, Hennepin County, Minn. My Commission Expires April 8, 1976.

EXHIBIT H

WALTER R. ANDERSON and THEODORE C. ANDERSON, and THEODORE C. ANDERSON as Administrator D.B.N. of the Estate of Eugene W. Anderson,

Respondents,

42161 vs.

JAMES E. ANDERSON, et al,

Defendants,

LAKELAND DEVELOPMMENT CORPORATION and DAVID W. ANDERSON,

Respondents,

LECON PROPERTIES, INC.,

Petitioner,

WILLIAM B. KORSTAD,

Appellant.

OPINION

PER CURIAM.

Petition for a peremptory writ of mandamus seeking an order of this court requiring the district court to vacate its

order entered April 15, 1970, and the amended judgment entered on April 21, 1970, and to grant petitioner's motion of January 30, 1970.

The issues raised in this proceeding are purely procedural and do not involve a review of any questions going to the merits of the action.

This action was commenced in 1967 and involved claims to real estate which had been sold by Lakeland Development Corporation (Lakeland) to Lecon Properties, Inc., (Lecon) in 1961. The trial was completed on August 30, 1968, and the trial court issued findings of fact, conclusions of law, and order for judgment on March 14, 1969. Judgment was entered on May 26, 1969.

In so far as relevant to this proceeding, the judgment decreed that Lecon "shall reconvey" its interest in the real estate to Lakeland "upon tender and payment" to Lecon by Lakeland "of all monies" Lecon paid to Lakeland and the fee owners for the property, together with taxes and assessments paid by Lecon, plus 6-percent interest per annum from the date of payments to the date of tender. The judgment then provided:

> "* * * Lakeland Development Corporation shall have six months from the date of this Judgment to make such tender and payment; and if Lakeland Development Corporation fails to do so, any claim it may have against Lecon Properties, Inc. and/or said land shall terminate."

Prior to the entry of judgment both Lecon and Lakeland made post-trial motions. Lecon sought amended findings eliminating its obligation to reconvey or in the alternative a new trial. Lakeland joined in a motion for amendment of the findings of fact and conclusions of law, which would permit Lakeland 12 months to make the tender or, in the event of appeal to the Minnesota Supreme Court, 12 months from the deter-

mination of the appeal. These motions were denied on May 9, 1969.

On June 12, 1969, following entry of judgment, Lecon appealed from the order denying its alternative motion and from the judgment to this court. As required by Rule 107, Rules of Civil Appellate Procedure, Lecon filed a cost bond. It did not choose to file a supersedeas bond. Rule 108, Rules of Civil Appellate Procedure. Lakeland did not appeal from the denial of its post-trial motion or from the judgment. Presumably, Lecon by its choice not to file a supersedeas bond intended to expose itself to the risk of having the reconvey the property if Lakeland made a tender within the time provided, despite its pending appeal.

On November 26, 1969, the time provided by the judgment for Lakeland to make tender to Lecon as a condition for reconveyance expired. On December 19, 1969, after the judgment became final as to Lakeland, Lecon made a motion in this court to remand the case to the district court to obtain relief from the judgment. Lecon alleged that Lakeland had failed to make the tender and payment and that Lakeland's interest in the land terminated by operation of the judgment, and upon being granted the relief prayed for its pending appeal would be dismissed. Lakeland opposed the motion on the grounds that Lecon's appeal had stayed the time when the tender or payment was required by the judgment to be made.

On January 19, 1970, we ordered this action remanded to the district court "to enable defendant Lecon to make, and the court to hear, a motion for relief from the jugment entered herein." Upon motion of Lakeland and the plaintiffs-respondents to also seek relief from the judgment on remand, this court clarified the January 19 remand order, declaring that the remand was intended to allow the district court to grant

such relief from the judgment to any or all of the parties "as the facts and law may require or warrant." We intended thereby that the district court would determine whether in fact the tender or payment contemplated by the judgment had been made and, if no tender or payment was made, resolve the question which then would arise as to whether Lecon's appeal stayed the time to make tender.

In the district court on January 30, 1970, Lecon made a motion for an order that it is entitled to the real estate and that Lakeland take nothing against either the property or Lecon. Lakeland, with plaintiffs-respondents joining, made a motion to amend the judgment of May 26, 1969, to provide that tender or payment be made within 1 year after disposition of the appeal.

In the hearing on these motions Lakeland expressly admitted that no tender or payment had been made by it within the 6-month period provided for in the judgment.

The district court by its order entered on April 15, 1970, denied Lecon's motion but in response to Lakeland's motion ordered that the judgment should be amended to provide:

> "Lakeland shall have nine (9) months from the date of entry of judgment herein, or in the event there is an appeal to the Supreme Court by Lecon, six (6) months after final determination by the Supreme Court, to make such tender and payment, and if Lakeland fails to do so, any claim it may have against Lecon and/or said land shall terminate."

In a memorandum the trial court explained:

> "It was the original intention of the Court to give Lakeland a reasonable opportunity to pay back Lecon and thus regain its land. The Court now realizes that the time limit of six months after judgment was not reasonable even

though Lecon had not appealed because of the uncertainty of title for the first three months in which an appeal could have been taken. Lakeland's financial position was such that it would have to use its equity in the land in question to finance repayment to Lecon.

"The Court feels it has the power under Rule 60.02 to amend its original 'conclusions' to give Lakeland six months after final determination by the Supreme Court to pay Lecon. This will make it unnecessary to rule on the more technical question of whether or not Lecon's appeal extended Lakeland's time to tender or repay Lecon."

Lecon then petitioned this court for a writ of mandamus, contending that its appeal did not stay the running of the time as specified in the judgment to make a tender or payment because no supersedeas bond was filed and that because the time to appeal had expired and the judgment had become final, the trial court lacked the authority to amend the judgment.

1. Generally, proceedings in the trial court are stayed only if a supersedeas bond is filed. Rule 108.01, Rules of Civil Appellate Procedure. It is elementary that, except as provided in Rule 108.01(6), the filing of a cost bond, as distinguished from a supersedeas bond, does not stay the proceeding in the trial court. Holmes v. Holmes, 253 Minn. 26, 91 N. W. (2d) 79; Lindberg v. Lindberg, 282 Minn. 536, 163 N. W. (2d) 870. See, also, State, by Clark, v. Robnan, Inc. 259 Minn. 88, 107 N. W. (2d) 51. As stated in 3 C. J., Appeal and Error, § 1448, p. 1322:

"* * * It may also be stated as the general rule that the running of the time within which a judgment or decree requires a party to perform specified conditions is stayed or suspended pending an appeal from the judgment or decree *with a supersedeas bond.*" (Italics supplied.)

See, also, 4 Am. Jur. (2d) Appeal and Error, § 364. The failure of Lecon to file a supersedeas bond and the failure of Lakeland to take an appeal from the denial of its post-trial motion or the judgment and file a supersedeas bond resulted in a judgment which was in no wise stayed during the pendency of Lecon's appeal.

It necessarily follows that under the terms of the judgment and the undisputed fact of no tender or payment within the time required, Lecon by operation of the terms of the judgment is entitled to the property in question, free and clear of any claims of Lakeland unless the district court had the authority to reopen and amend the judgment.

2. We hold that the district court lacked the authority to amend the judgment entered on May 26, 1969, after the judgment had become final as to Lakeland.

The district court purported to act under the authority of Rules of Civil Procedure, Rule 60.02, which allows a court to relieve a party from a final judgment, order, or proceeding and to order a new trial or grant such other relief as may be just. Rule 60.02 can be utilized only if one of the six grounds specified exists.[1] Brown's Bay Marine Corp. v. Skrypec, 271 Minn. 523, 136 N. W. (2d) 590. The court did not state on which of the six clauses it was basing its decision.

In our examination of the file before us, we find no facts which would justify the granting of relief from the judgment

[1] Under Rules of Civil Procedure, Rule 60.02, the court may grant relief "for the following reasons: (1) Mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.03; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

to Lakeland under clauses 1 through 5. If facts were presented to the district court which would have allowed it to act under one or more of these clauses, they were not made part of the record nor were they presented to us when Lakeland appeared to contest this petition.

Therefore, the district court must have relied on Rule 60.02(6)—"any other reason justifying relief from the operation of the judgment." Rule 60.02(6) is a residual clause to cover any unforeseen contingency and it is exclusive of clauses (1) through (5). Newman v. Fjelstad, 271 Minn. 514, 137 N. W. (2d) 181; Simons v. Schiek's, Inc. 275 Minn. 132, 145 N. W. (2d) 548.

The district court seems to have decided that the time limit of 6 months, originally provided for in the judgment, was so unreasonable as to be a "reason justifying relief from the operation of the judgment." We are unable to agree with this conclusion. The court was informed of all the facts necessary to set a time limit at the time the judgment was entered. The court had denied a motion to amend the findings of fact and conclusions of law to provide for a time limit of 1 year or, in the event of an appeal, 1 year from determination of the appeal. Upon this record, nothing new was presented to the court between the time this motion was denied on May 9, 1969, and the time it granted Lakeland's similar motion on April 15, 1970 after the time to amend the judgment had expired.

Rule 60.02(6) was not intended to allow the district court to reopen or amend judgments beyond the normal time limit merely because the court feels it has committed some judicial error. Barrett v. Macdonald, 264 Minn. 560, 121 N. W. (2d) 165. Finality of judicial decisions requires that parties seek relief from judicial error through the appellate process, available to Lakeland in this case.

For the foregoing reasons we grant the writ of mandamus. The district court shall vacate the order of April 15, 1970, and the amended judgment entered on April 21, 1970, and grant petitioner Lecon's motion of January 30, 1970.

Let the writ issue.

MR. JUSTICE KELLY, not having been a member of this court at the time of the submission, took no part in the consideration or decision of this case.

EXHIBIT I

STATE OF MINNESOTA
IN SUPREME COURT

Walter R. Anderson and Theodore C. Anderson,
and Theodore C. Anderson as Administrator
D.B.N. of the Estate of Eugene W. Anderson,
Respondents,

vs. 42161

James E. Anderson, et al,
Defendants,

Lakeland Development Corporation and
David W. Anderson,
Respondents,

Lecon Properties, Inc.,
Petitioner,

William B. Korstad,
Appellant.

PEREMPTORY WRIT OF MANDAMUS

To the District Court of Washington County and the Honorable John F. Thoreen, one of the Judges thereof, Greetings:

WHEREAS, upon a consideration of the petition for a writ of mandamus, this court having filed an opinion in said matter on July 31, 1970 directing that a peremptory writ of mandamus issue as requested in the moving papers herein;

NOW THEREFORE, we being willing that speedy justice should be done in behalf of the petitioner, do command and direct that you immediately after receipt of this writ, vacate the order of April 15, 1970, and the amended judgment entered on April 21, 1970, and grant petitioner Lecon's motion of January 30, 1970. And you are further directed to make known to us promptly that you shall have executed this writ, and have you then and there this writ.

WITNESS the Honorable Oscar R. Knutson, Chief Justice of the Supreme Court aforesaid, and the seal of said court at St. Paul, Minnesota, this 8th day of October, 1970.

JOHN McCARTHY
Clerk of Supreme Court

EXHIBIT J

State of Minnesota
County of Anoka

District Court
Tenth Judicial District

File No. 27877

Walter R. Anderson and Theodore C. Anderson, and Theodore C. Anderson as Administrator D.B.N. of the Estate of Eugene W. Anderson,

Plaintiffs,

vs.

James E. Anderson, Lecon Properties, Inc., a Minnesota corporation, Lakeland Development Corporation, a Minnesota corporation, David W. Anderson, and William B. Korstad,

Defendants.

ORDER

Pursuant to the Preemptory Writ of Mandamus of the Minnesota Supreme Court dated October 8, 1970, and served on the undersigned on October 14, 1970,

IT IS HEREBY ORDERED:

1. That this Court's Order dated April 15, 1970, is hereby vacated.
2. That the amended judgment entered on April 21, 1970, is hereby vacated.
3. That Paragraph 1 of the judgment which was originally entered herein on May 26, 1969, be and hereby is vacated and set aside and in lieu thereof said Paragraph 1 of such judgment shall specify that Lecon Properties, Inc. is entitled to judgment and that the plaintiff and Lakeland De-

velopment Corporation take nothing against Lecon Properties, Inc. and/or Tracts B and C.

4. That that certain notice of lis pendens relating to this action which was dated and recorded on December 2, 1966, in the office of the Register of Deeds of Anoka County, Minnesota, as Document No. 293411 shall be and hereby is discharged of record.

JOHN F. THOREEN
District Judge

Dated this 14th day of October, 1970.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil Action File
4-71 Civ. 139

WALTER R. ANDERSON, THEODORE C. ANDERSON, DAVID W. ANDERSON, and LAKELAND DEVELOPMENT CORPORATION, a Minnesota corporation,

Plaintiffs,

vs.

LECON PROPERTIES, INC., a Minnesota corporation,

Defendant.

ANSWER

Comes now the defendant, Lecon Properties, Inc., a Minnesota corporation (Lecon), and for its answer to the complaint of the plaintiffs herein:

I

States that except as hereinafter admitted, qualified or otherwise answered, the defendant denies each and every allegation, matter and thing in said complaint contained.

II

Admits that Lecon is referred to in the complaint as the defendant and that it is a Minnesota corporation with its principal place of business in Minnesota.

III

Admits that the plaintiffs Walter, Theodore and David Anderson are citizens of the State of Minnesota and reside in Minnesota, although the exact street addresses of said plaintiffs are unknown to this defendant; admits that the plaintiff Lakeland Development Corporation (Lakeland) is a Minnesota corporation having its office and principal place of business in Minnesota, although its exact office address is unknown to this defendant.

IV

Admits that Exhibit B attached to the complaint is a true and correct copy of the Findings of Fact and Conclusions of Law and Order for Judgment which was duly filed on or about March 17, 1969, in the District Court, Tenth Judicial District, County of Anoka, State of Minnesota, File No. 27877.

V

Admits that Exhibit C attached to the complaint is a true and correct copy of the judgment which was entered in the aforementioned File No. 27877 and alleges that on or about June 12, 1969, this defendant took an appeal to the Supreme Court of Minnesota from the said judgment and from the Order of the District Court, Tenth Judicial District, County of Anoka, entered on May 12, 1969, denying this defendant's motion for amended findings or in the alternative for a new trial.

VI

Admits that it moved the Supreme Court of Minnesota to remand the case to the aforementioned District Court.

VII

Admits that Exhibit D attached to the complaint is a true and correct copy of an Order entered by the Supreme Court of Minnesota in connection with its Order remanding the aforementioned case to the said District Court of Anoka County.

VIII

Admits that Exhibit E attached to the complaint is a true and correct copy of an Order and Memorandum in the aforesaid District Court File No. 27877 and that Exhibit F is a true and correct copy of a purported amended judgment in the aforesaid District Court File No. 27877.

IX

Admits that Exhibit G appears to be a true and correct copy of a Petition for Writ of Mandamus submitted on behalf of this answering defendant.

X

Admits that Exhibit H appears to be a true and correct copy of an opinion and Order of the Supreme Court of Minnesota; that Exhibit I appears to be a true and correct copy of a Peremptory Writ of Mandamus issued under the signature of the Clerk of the Supreme Court of Minnesota; and that Exhibit J appears to be a true and correct copy of an Order dated October 14, 1970 in the aforesaid District Court File No. 27877.

XI

Asserts the following defenses:

First Defense

This Court lacks jurisdiction of the parties and of the subject matter.

Second Defense

The complaint fails to state a claim against this answering defendant upon which relief can be granted.

Third Defense

No controversy of a justiciable nature exists between plaintiffs and this answering defendant.

WHEREFORE, this answering defendant prays that the plaintiffs' complaint be hence dismissed with costs and for such other and further relief as the Court may deem just and equitable under the circumstances.

FREDRIKSON, BYRON,
COLBORN, BISBEE,
HANSON & PERLMAN, P.A.
By Jerome B. Pederson
Attorneys for Defendant
1460 Northwestern Bank
Building
Minneapolis, Minnesota 55402
339-8331

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-71 Civ. 139

WALTER R. ANDERSON, THEODORE C. ANDERSON, DAVID W. ANDERSON, and LAKELAND DEVELOPMENT CORPORATION, a Minnesota Corporation,

Plaintiffs,

vs.

LECON PROPERTIES, INC., a Minnesota Corporation,

Defendant.

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING PLAINTIFFS' COMPLAINT

The above entitled case came duly on for hearing before this court on July 2, 1971, at Minneapolis, Minnesota, on the motion of plaintiffs for summary judgment in their favor, pursuant to Rule 56 of the Federal Rules of Civil Procedure. At the hearing counsel, on inquiry from the court, stipulated and agreed that the case could be decided on the merits and treated as though defendant had made a counter motion for dismissal or for summary judgment. Both counsel agreed that the case presents no material question of fact and that no witnesses would be called at trial. The exhibits attached to plaintiffs'

complaint are admitted by defendant to be true and correct and it appears to the court that the questions raised by the pleadings are purely legal ones and not fact issues.

Harry H. Peterson, Esq., Minneapolis, Minnesota, appeared for the plaintiff; Fredrikson, Byron, Colborn, Bisbee, Hanson and Perlman, Minneapolis, Minnesota, by Jerome B. Pederson, Esq., appeared for the defendant.

The court heard the arguments of counsel, has examined the pleadings and exhibits and particularly the well prepared and complete brief submitted by counsel for plaintiffs and based thereon and on all of the files, records and proceedings herein,

IT IS ORDERED that plaintiffs' motion for summary judgment in their favor be and the same hereby is denied.

IT IS FURTHER ORDERED that the plaintiffs' complaint be, and the same hereby is, dismissed with prejudice on the merits.

LET JUDGMENT BE ENTERED ACCORDINGLY.

PHILIP NEVILLE
United States District Judge

Dated: July 19, 1971.

(Filed July 19, 1971 — Harry A. Sieben, Clerk, by Eleanor Mollner, Deputy.)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-71 Civ. 139

WALTER R. ANDERSON, THEODORE C. ANDERSON, DAVID W. ANDERSON, and LAKELAND DEVELOPMENT CORPORATION, a Minnesota Corporation,

Plaintiffs,

vs.

LECON PROPERTIES, INC., a Minnesota Corporation,

Defendant.

NEVILLE, District Judge.

In this somewhat unusual Civil Rights suit brought under 42 U.S.C. § 1983, plaintiffs challenge the Supreme Court of the State of Minnesota and allege that it deprived them of their civil rights by the issuance of a peremptory writ of mandamus to the state trial court directing the vacation of a certain order and amended judgment.

It would appear that sometime in 1960, plaintiffs or their predecessors in interest granted to defendant an option to purchase certain tracts of land in Anoka County, Minnesota. Some years later, plaintiffs instituted an action in the Minnesota State Court seeking in effect to rescind or to cancel the option agreement. On March 14, 1969 the trial court entered its findings of fact—an order requiring defendant to reconvey its interest in the acreage "upon tender and payment to Lecon [defendant] by Lakeland [one of plaintiffs] of all monies

Lecon has paid to Lakeland and the fee-owners pursuant to the contracts with Lakeland . . . plus the additional amounts Lecon has paid for taxes and assessments and plus interest at 6% per annum. . . ." The judgment entered May 26, 1969 pursuant to these findings provided *inter alia* that Lakeland should have six months from the date of entry of judgment within which to make such tender and payment. Counsel advised at the hearing that the amount necessary to tender or to pay to Lecon approximated $200,000. Defendant Lecon appealed from the May 26, 1969 judgment to the Minnesota Supreme Court, but posted only a cost bond and not a *supersedeas* bond. Plaintiffs took no appeal. While the appeal was pending the six months period mentioned in the judgment expired and no tender or payment was made by plaintiffs or Lakeland. Thereupon defendant moved the Supreme Court for an order remanding the case to the trial court, seeking thereby to obtain a forum to enable it to secure an adjudication that no payment or tender had been made by plaintiffs within the six months period, so as to make its title marketable and to discharge a *lis pendens* thereon. The remand was granted January 19, 1970, but on the joint motion of all of the parties a subsequent order was entered by the Supreme Court on February 17, 1970 authorizing "the district court to grant such relief from the judgment to any parties to the litigation as the facts and law may require or warrant . . . [and] to seek such relief from the judgment entered herein as they may be advised." Upon such remand the trial court entered an order dated April 15, [sic] 1970 amending the original judgment so as to grant plaintiff Lakeland nine months "from the date of entry of judgment herein, or in the event there is an appeal to the Supreme Court by Lecon, six months after final determination by the Supreme Court, to make such a

tender and payment. . . ." The trial court in its memorandum stated: "The court now realizes that the time limit of six months after judgment was not reasonable even though Lecon had not appealed because of the uncertainty of title for the first three months in which an appeal could have been taken. Lakeland's financial position was such that it would have to use its equity in the land in question to finance its repayment to Lecon." The trial court believed it had the power so to amend the judgment under Rule 60.02 of the Minnesota Rules of Civil Procedure and stated it was unnecessary to make a determination of the technical question as to whether Lecon's appeal extended Lakeland's time to tender to or to repay Lecon, concluding in a memorandum as follows:

> "However, if Lecon's basic argument is correct, i.e., that plaintiffs' rights are gone because of their failure to tender and that this Court has no authority or jurisdiction to amend its original Findings pursuant to the February 17, 1970, Order of the Supreme Court, it should now be in a position to have these issues determined finally by the Supreme Court and obtain the relief it seeks."

An amended judgment accordingly was entered dated April 21, 1970. Shortly thereafter Lecon did not appeal but petitioned the Minnesota Supreme Court for a writ of Mandamus in response to which that court, filed July 31, 1970 and accompanied by a seven-page opinion, issued a peremptory writ of mandamus whereby it did "command and direct that you [the trial judge] immediately after receipt of this writ, vacate the order of April 15, [sic] 1970 and the amended judgment entered on April 21. 1970, and grant petitioner Lecon's motion of January 30, 1970 [the "title clearing" motion]. October 14, 1970 pursuant to said writ of mandamus,

the trial court did just that and also discharged a *lis pendens* which had been filed against the property.

Plaintiffs contend that all proceedings had in the Minnesota Supreme Court "were had without jurisdiction of the subject matter" and that the writ of mandamus and trial court order entered pursuant thereto are void and a nullity; that under the Minnesota Constitution the Minnesota Supreme Court was without power to issue such a remedial writ; that the Minnesota Constitution provides that the Supreme Court "shall have original jurisdiction in such remedial cases as may be prescribed by law;" and that the applicable statute is Minn. Stat. § 586.01 which reads as follows:

> "The writ of mandamus may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. It may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions *but it cannot control judicial discretion.*" [Emphasis added.]

It is plaintiffs' contention that though the Supreme Court may issue a writ to a lower court to compel it to exercise its discretion, it cannot dictate the manner in which it will exercise that discretion: *Swanson v. Alworth*, 159 Minn. 193, 198 N.W. 453 (1924); that since this concept was abused the Minnesota Supreme Court acted beyond its jurisdiction, its action is utterly void and plaintiffs are deprived of their Federal Constitutional rights to due process and equal protection by this state action.

Plaintiffs thus bring this action under the 1871 Civil Rights Law, 42 U.S.C. § 1983 and under 28 U.S.C. § 1343 conferring jurisdiction on this court in Civil Rights cases. The question is squarely presented as to whether such action as was taken

by the Minnesota Supreme Court is a violation either of due process or the equal protection clauses of the Federal Constitution.

It is of course axiomatic that a judgment entered without jurisdiction is void. No elaborate authority need be cited for this proposition. *Vallely v. Northern Fire Ins. Co.*, 254 U.S. 348 (1920); *Norris Grain Co. v. Nordaas*, 232 Minn. 91, 46 N.W. 2d 94 (1950). The question then is whether the writ of mandamus was in excess of the Minnesota Supreme Court's jurisdiction. In this court's opinion it was not. The Minnesota Supreme Court reasoned—and it would seem to this court correctly—that since plaintiffs themselves took no appeal from the May 26, 1969 judgment, on expiration of the time to appeal such became a final judgment; that though defendant Lecon did appeal, it posted only a cost and not a *supersedeas* bond and therefore plaintiffs at any time within the allowed six month period could have paid or tendered defendant the amount required by the judgment and defendant would have been required to abide the terms thereof and to reconvey the property; that this remained true despite the fact that defendant obtained several extensions of time to file a brief on the appeal. The remand by the Supreme Court, though somewhat confusingly authorizing the trial court to grant relief "to any parties to the litigation" and to "seek such relief from the judgment . . . as they may be advised" did not authorize the trial court under Rule 60.02 of the Minnesota Rules of Civil Procedure to amend or to modify the original judgment of May 26, 1969, but only to take such additional action as would effectuate and carry out the terms of the judgment. The rule, the court stated:

'. . . was not intended to allow the district court to reopen or amend judgments beyond the normal time limit merely because the court feels it has committed some judicial error. *Barrett v. Macdonald*, 264 Minn. 560, 121 N.W. 2d 165 (1963). Finality of judicial decisions requires that parties seek relief from practical error through the appellate process, available to Lakeland [one of plaintiffs] in this case."

It follows as an *a fortiori* from this premise that the Supreme Court by granting the writ of mandamus was not directing the trial court as to the manner in which it should exercise its discretion or carry out a discretionary act, but merely commanding it to do a simple ministerial act, i.e., expunge or erase an order and an amended judgment, both of which were void and nullities inasmuch as the trial court had no jurisdiction to enter such. Since a judgment granted without jurisdiction over the subject matter is not merely voidable but void, as plaintiffs' counsel so ably points out in his brief, the Supreme Court did not violate Minn. Stat. § 586.01, nor the Minnesota Constitution in ordering the eradication of a void order and judgment, and so did not violate plaintiffs Federal constitutional rights of due process and/or equal protection. It seems clear that actions of a State court may constitute "state action" within the meaning of 42 U.S.C. § 1983, *Shelley v. Kraemer*, 334 U.S. 1 (1948), but plaintiffs here have not demonstrated and cannot demonstrate to the satisfaction of this court, the deprivation of any of their federally protected constitutional rights. Consequently, plaintiffs' complaint must be dismissed.

This view of the case renders unnecessary a consideration in defendant's well briefed contention that this court lacks juris-

diction since it is a court of original jurisdiction and not an appellate court, and avoids the concommitant delicate question of abstention by a Federal Court to interfere with and be in conflict with State Court decisions. Further, it is not necessary to base this decision on the premise, which may have some merit, that since an appeal originally was taken by defendant Lecon, the Minnesota Supreme Court never really lost jurisdiction over the case even though it entered an order remanding for a specific purpose, so that its writ of mandamus is not an "original proceeding" and in essence nothing more than a decision on appeal but countenancing, as the court often does, a later developing factual situation.

This memorandum and order shall be in lieu of formal findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

A separate order has been entered.

COPY

FILED
AUG 30 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

DOCKET NO. 72-138

WALTER R. ANDERSON, THEODORE C. ANDERSON, THEODORE C. ANDERSON, as Administrator D.B.N. of the Estate of Eugene W. Anderson, DAVID W. ANDERSON, and LAKELAND DEVELOPMENT CORPORATION, a Minnesota Corporation,
Petitioners,

VS.

LECON PROPERTIES, INC., a Minnesota Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAROLD M. FREDRIKSON
FREDRIKSON, BYRON, COLBORN, BISBEE, HANSEN & PERLMAN, P.A.
1460 Northwestern Bank Bldg.
Minneapolis, Minnesota 55402
Phone: 339-8331
Counsel for Respondent

1972—Northwest Brief Printing Co., 501 Park Ave., Minneapolis 55415 338-5078

TABLE OF CONTENTS

		Page
I.	Opinions Below	2
II.	Jurisdiction	2
III.	Constitutional Provisions and Statutes Involved	2
IV.	Questions Presented for Review	2
V.	Statement of Case	3
VI.	Argument	4
	A. The Minnesota Supreme Court had personal and subject matter jurisdiction to consider respondent's request and issue the writ of mandamus and the writ was properly issued within the powers granted to it by the law of its organization	5
	1. The Minnesota Supreme Court had personal and subject matter jurisdiction to consider and issue the writ of mandamus	5
	2. The Minnesota Supreme Court properly issued the writ within the powers granted to it by the law of its organization	6
	3. The decision of the Minnesota Supreme Court cannot be collaterally attacked in the United States District Court on the basis of mere error, if any, made in the proceedings which led to the judgment	7
	B. The Petitioners are not entitled to relief under 42 U.S.C. §1983 because the respondent did not act "under color of" state law in obtaining the writ of mandamus	9

C. This case does not involve any issues of peculiar gravity or of constitutional importance, and the decisions below are not in conflict with decided authority 10

VII. Conclusion 11

TABLE OF AUTHORITIES

Cases:

Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522 (1931) 8
Durfee v. Duke, 375 U.S. 106 (1963) 8
Harris v. Turner, 329 F.2d 918 (6th Cir. 1964), cert. denied, 379 U.S. 907 (1964) 10
H. J. Heinz Co. v. Owens, 189 F.2d 505 (9th Cir. 1951) 8
Kamsler v. M.F.I. Corp., 359 F.2d 752 (7th Cir. 1966) 10
Kinney v. Johnson, 319 F.2d 355 (9th Cir. 1963), cert. denied, 375 U.S. 908 (1963) 10
McLain v. Lance, 146 F.2d 341 (5th Cir. 1945) 8
National Cancer Hospital of America v. Webster, 251 F.2d 469 (2d Cir. 1958) 8
Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 8
Skolnick v. Martin, 317 F.2d 855 (7th Cir. 1963), cert. denied, 375 U.S. 908 (1963) 10
Skolnick v. Spolar, 317 F.2d 857 (7th Cir. 1963) 10
Stoll v. Gottlieb, 305 U.S. 165 (1938) 8
Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) 8
Williams v. Yellow Cab Co., 200 F.2d 302 (1st Cir. 1953) 9
Wilson v. Walker, 109 U.S. 258 (1883) 6

Constitution:

Constitution of the State of Minnesota, Art. 6, Sec. 2 5
Comment, Federal Comity, Official Indemnity, and the Dilemma of Section 1983, 1967 Duke L.J. 741 9

Rules:

Minnesota Rules of Civil Appellate Procedure, Rule 120, Vol. 27A, Minn. Stat. Annot. 7
Minnesota Rules of Civil Procedure, Rule 60.02, Vol. 27A, Minn. Stat. Annot. 7

Statutes:

Minn. Stat. §480.04 (1969) 2, 5
Minn. Stat. §586.01 (1969) 6, 7
28 U.S.C. §1254 2
42 U.S.C. §1983 .....3, 4, 9

In the
Supreme Court of the United States

OCTOBER TERM, 1972

DOCKET NO. 72-138

WALTER R. ANDERSON, THEODORE C. ANDERSON, THEODORE C. ANDERSON, as Administrator D.B.N. of the Estate of Eugene W. Anderson, DAVID W. ANDERSON, and LAKELAND DEVELOPMENT CORPORATION, a Minnesota Corporation,
Petitioners,

vs.

LECON PROPERTIES, INC., a Minnesota Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Lecon Properties, Inc., a Minnesota Corporation, by Harold M. Fredrikson, its attorney duly authorized, petitions this Court to deny the Writ of Certiorari sought by petitioners herein and filed with this Court on July 24, 1972.

I.

OPINIONS BELOW

In addition to decisions of the United States District Court for the District of Minnesota and the United States Court of Appeals for the Eighth Circuit, the decision of the Minnesota Supreme Court is reported at 288 Minn. 514, 179 N.W.2d 718 (1970).

II.

JURISDICTION

The respondent acknowledges that petitioners are attempting to invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the Constitutional Provisions and Statutes set forth in the petition, the following statute is involved: Minn. Stat. §480.04 (1969).

IV.

QUESTIONS PRESENTED FOR REVIEW

The petitioners' statement of the questions presented for review reflects their mistaken analysis of the opinions below and the issues involved therein. The questions stated in the petition should properly be phrased:

1. Whether the institution and prosecution of the action for declaratory relief in the United States District Court constituted an attempt to review on appeal the

decision of the Minnesota Supreme Court where the state court's jurisdiction was clearly premised on the state constitution and statutes and where the petitioners raised the same jurisdictional arguments in the state court proceedings.

2. Whether there is any appearance of error in the opinions below holding that the writ of mandamus issued by the Minnesota Supreme Court was not void for lack of jurisdiction.

3. Whether the petitioners, under the circumstances of this case, are entitled to claim relief under 42 U.S.C. § 1983.

V.

STATEMENT OF CASE

The petitioners sought to invoke the jurisdiction of the District Court under 42 U.S.C. §1983 and requested the District Court to enter a declaratory judgment adjudging and decreeing that a certain writ of mandamus issued pursuant to the per curiam opinion of the Minnesota Supreme Court on July 3, 1970, is null and void for lack of jurisdiction. The District Court dismissed the complaint on the ground that the Minnesota Supreme Court did not exceed its jurisdiction when it issued the writ of mandamus. The Court of Appeals for the Eighth Circuit affirmed the decision of the District Court in a per curiam opinion and thereafter denied a motion for rehearing.

No useful purpose would be served in attempting to recite the facts which are relevant and material to the issues. It may be noted that the said per curiam opinion of the Minnesota Supreme Court, as reported at 179 N.W.

2d 718, sets forth the facts as does the opinion of the United States District Court. The respondent does feel compelled, however, to respond to one factual inaccuracy in the petitioners' statement of the case. The petitioners contend that respondent obtained from the Minnesota Supreme Court numerous extensions of time within which to file its appeal brief and appendix and that such extensions exceeded the six-month period allowed by the lower court judgment for the so-called tender and payment. No such extensions of time were obtained prior to the expiration of the so-called redemption period on November 27, 1969.

VI.

ARGUMENT

From the analysis that follows, the following conclusions are apparent and suggest that this cause does not warrant review by this Court:

A. The judicial determination of the Minnesota Supreme Court and the resulting writ of mandamus was not subject to attack in the United States District Court because the Minnesota Supreme Court had personal jurisdiction, subject matter jurisdiction, and correctly decided the matter within the powers granted to it by the law of its organization.

B. The petitioners are not entitled to relief under 42 U.S.C. §1983 because the respondent did not act "under color of" state law in obtaining the writ of mandamus.

C. This case does not involve any issues of peculiar gravity or of constitutional importance, and the decisions below are not in conflict with decided authority.

A. THE MINNESOTA SUPREME COURT HAD PERSONAL AND SUBJECT MATTER JURISDICTION TO CONSIDER RESPONDENT'S REQUEST AND ISSUE THE WRIT OF MANDAMUS AND THE WRIT WAS PROPERLY ISSUED WITHIN THE POWERS GRANTED TO IT BY THE LAW OF ITS ORGANIZATION.

1. The Minnesota Supreme Court had personal and subject matter jurisdiction to consider and issue the writ of mandamus.

There is no dispute concerning the fact that the Minnesota Supreme Court had personal jurisdiction over the parties. The Court also had subject matter jurisdiction. Article 6, Section 2, of the Constitution of the State of Minnesota and Minn. Stat. §480.04 (1969) (a section of the Minnesota Statutes which the petitioners have consistently failed to cite) clearly indicate that a petition for a writ of mandamus is among the class of actions that the Minnesota Supreme Court is authorized to entertain. Minn. Stat. §480.04 provides as follows:

> The Court *shall have power to issue* to all courts of inferior jurisdiction and to all corporations and individuals, writs of error, certiorari, mandamus, prohibition, quo warranto and all other writs and processes, *whether especially provided for by statute or not, that are necessary to the execution of the laws and the furtherance of justice.* It shall be always open for the issuance and return of such writs and processes and for the hearing and determination of all matters involved therein and for the entry in its minutes of such orders as may from time to time be necessary to carry out the power and authority conferred upon it by law, subject to such regulations as it may prescribe. Any justice of the court, either

> in vacation or in term, may order the writ or process to issue and prescribe as to its service and return. (Emphasis added.)

Thus, the Minnesota Supreme Court had personal and subject matter jurisdiction to consider the respondent's petition for a writ of mandamus, and its decision thereon can be attacked only on grounds of mere error in granting the same, and not, as petitioners contend, on the ground of usurpation of jurisdiction.

2. The Minnesota Supreme Court properly issued the writ within the powers granted to it by the law of its organization.

The petitioners contend that the Minnesota Supreme Court cannot control the exercise of judicial discretion by a writ of mandamus. In support of this proposition they cite Minn. Stat. §586.01. The respondent does not dispute this proposition of law. However, the petitioners argue further that the writ in question did in fact control the judicial discretion of the lower court and it is therefore null and void. The petitioners cite *U.S. to the Use of Wilson v. Walker,* 109 U.S. 258 (1883), in support of the proposition that even though a court may have personal and subject matter jurisdiction, if it makes a decree which is not within the powers granted to it by the law of its organization, such a decree is void. There is no need to analyze the precise holding in *Walker* because the premise of the petitioners is in error.

It is obvious that the writ of mandamus did not operate to control the judicial discretion of the lower court, and therefore the Minnesota Supreme Court did not exceed its jurisdiction when it issued the writ. No other conclu-

sion can be reached. The per curiam opinion is clear and unambiguous. The Minnesota Supreme Court did not purport to control the discretion of the lower state court but rather found that the lower court had no discretion to exercise by virtue of Rule 60.02 of the Minnesota Rules of Civil Procedure under the facts and circumstances of the case. As the Minnesota Supreme Court stated:

> Rule 60.02(6) was not intended to allow the district court to reopen or amend judgments beyond the normal time limit merely because the court feels it has committed some judicial error. *Barrett v. MacDonald*, 264 Minn. 560, 121 N.W.2d 165. (179 N. W.2d at 722).

Thus, the Minnesota Supreme Court issued the writ of mandamus to compel the lower court to discharge its function, *i.e.*, to grant respondent the relief from the judgment to which it was entitled as a matter of right. This is clearly a function of the writ. See Minn. Stat. §586.01 (1969), and the Advisory Committee's Notes pertaining to Rule 120 of the Minnesota Rules of Civil Appellate Procedure, Vol. 27A, Minn. Stat. Annot.

3. The decision of the Minnesota Supreme Court cannot be collaterally attacked in the United States District Court on the basis of mere error, if any, made in the proceedings which led to the judgment.

Even if the Minnesota Supreme Court erred in granting the writ of mandamus, its decision cannot be collaterally attacked in the United States District Court. This general rule is especially applicable in the case at bar

because jurisdiction of the United States District Court is original and not appellate. Many cases may be cited in support of this principle of law, and perhaps the best example is *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). *See also McLain v. Lance*, 146 F.2d 341 (5th Cir. 1945); *H. J. Heinz Co. v. Owens*, 189 F.2d 505 (9th Cir. 1951); *National Cancer Hospital of America v. Webster*, 251 F.2d 469 (2d Cir. 1958).

A corollary to the aforementioned general rule is that if the jurisdiction issue has been raised and decided by one court it cannot be raised for a redetermination in the United States District Court. *See, e.g., Durfee v. Duke*, 375 U.S. 106 (1963); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939); *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Baldwin v. Iowa State Traveling Mens Association*, 283 U.S. 522 (1931). The petitioners opposed the respondent's petition in the Minnesota Supreme Court for the writ of mandamus by directly challenging the jurisdiction of the Court to issue the same contending that to do so would be to control the discretion of the lower court. The Minnesota Supreme Court necessarily ruled on the issue when it issued the writ, and petitioners were properly precluded from seeking a redetermination in the United States District Court.

B. THE PETITIONERS ARE NOT ENTITLED TO RELIEF UNDER 42 U.S.C. §1983 BECAUSE THE RESPONDENT DID NOT ACT "UNDER COLOR OF" STATE LAW IN OBTAINING THE WRIT OF MANDAMUS.

The petitioners' entitlement to relief is dependent upon a showing that the respondent acted "under color of" state law within the meaning of 42 U.S.C. §1983 in obtaining the writ of mandamus from the Minnesota Supreme Court. However, it has been held many times that an invasion of an individual's rights by another private individual is not within the purview of §1983, since that section is directed only to state action. *See, e.g., Williams v. Yellow Cab Co.*, 200 F.2d 302 (1st Cir. 1953). The courts have uniformly upheld the firm conclusion that the state must in some manner give to the defendant the appearance of state authority before the "under color of" language of §1983 is satisfied. *A private individual is not deemed to have been clothed with state action merely because he initiates a lawsuit in state court.* The rule is stated in Comment, *Federal Comity, Official Indemnity, and the Dilemma of Section 1983*, 1967 DUKE L. J. 741, as follows:

> The existence of state laws and judicial machinery may provide the vehicle by which private persons are able to deprive others of federal rights. Nevertheless, in such instances, no liability has been found because the state is not considered to have taken an affirmative act which would create an appearance of state authority in a private person. For instance, private individuals who institute legal proceedings in courts provided by the state do not act "under color of" state law, even if by doing so they allegedly violate the federal rights of others. *Id.* at 765.

For cases in accord with this principle, see *Kamsler v. M.F.I. Corp.*, 359 F.2d 752 (7th Cir. 1966); *Harris v. Turner*, 329 F.2d 918 (6th Cir. 1964), *cert. denied*, 379 U.S. 907 (1964); *Kinney v. Johnson*, 319 F.2d 355 (9th Cir. 1963), *cert. denied*, 375 U.S. 908 (1963); *Skolnick v. Martin*, 317 F.2d 855 (7th Cir. 1963), *cert. denied*, 375 U.S. 908 (1963); and *Skolnick v. Spolar*, 317 F.2d 857 (7th Cir. 1963).

C. THIS CASE DOES NOT INVOLVE ANY ISSUES OF PECULIAR GRAVITY OR OF CONSTITUTIONAL IMPORTANCE, AND THE DECISIONS BELOW ARE NOT IN CONFLICT WITH DECIDED AUTHORITY.

It is obvious that the courts below have not decided any federal question of substance which is not in accord with the pronouncements of the United States Supreme Court. Furthermore, the decision by the Court of Appeals for the Eighth Circuit is not in conflict with the decisions of the other circuits in analogous situations involving the same issues. Thus, this case does not warrant review.

VII.
CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in the Supreme Court of the United States, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

HAROLD M. FREDRIKSON
FREDRIKSON, BYRON, COLBORN, BISBEE,
HANSEN & PERLMAN, P.A.
1460 Northwestern Bank Bldg.
Minneapolis, Minnesota 55402
Phone: 339-8331
Counsel for Respondent

LE COP

72-138

SUPREME COURT, U.S.
FILED
SEP 11 1972
E. ROBERT SEAVER, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

Docket No. ———

WALTER R. ANDERSON, THEODORE C. ANDERSON, DAVID W. ANDERSON, and LAKELAND DEVELOPMENT CORPORATION, and THEODORE C. ANDERSON, as administrator D.B.N. of the estate of EUGENE ANDERSON, Deceased,

Plaintiffs-Appellants,

vs.

LECON PROPERTIES, INC., a Minnesota corporation,

Defendant-Appellee.

BRIEF OF PETITIONERS ANSWERING THE OPPOSITION BRIEF OF RESPONDENT

HARRY H. PETERSON
Attorney for Plaintiffs-Appellants
738 Midland Bank Building
Minneapolis, Minnesota 55401
(612) 335-5254

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

	PAGE
Introductory	1
Argument	
I. Respondent failed to discuss M.S.A. Sec. 586.01 which is printed at page 4 of the Petition	2
II. The judgment in the mandamus proceedings is subject to collateral attack	2
III. A Minnesota judgment is always open under Minnesota law for collateral attack for lack of jurisdiction of the subject matter	3
IV. There was no contested adjudication by the Supreme Court of Minnesota that it had jurisdiction in the mandamus proceedings	4
V. Respondent is liable for action taken "under color" of state law	4
VI. The vacation of the Anoka County judgment in favor of petitioners and against the respondent by means of the mandamus proceedings instituted by respondent constitutes the deprivation of petitioners' rights to the judgment under color of state law	6
VII. There is no basis for respondent's statement relative to the number of extensions granted by the Supreme Court of Minnesota	7
VIII. The mandamus proceedings of the Supreme Court of Minnesota control the judicial discretion of the District Judge of Anoka County	7
IX. Respondent's statement that the District Court of Anoka County had no jurisdiction to amend the judgment is without any basis	8
Conclusion	9

AUTHORITIES CITED

PAGE

Cases:

Arrowsmith v. Gleason, 129 U.S. 86, 32 L. Ed. 635 5

Briggs v. Chicago G.W. Ry. Co., 243 Minn. 566, 68 N.W. 2d 870 8

Evans v. Newton, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 6

Johnson v. Waters, 111 U.S. 640, 28 L. Ed. 356 5

Matter of Baltimore Mail S.S. Co. v. Fawcett, 269 N.W. 379, 199 N.E. 628, 104 A.L.R. 1068 3

Maryland Casualty Company v. Waldrep, 10 Cir., 126 Fed. 555 8

N.A.A.C.P. v. Alabama, 377 U.S. 288, 84 S. Ct. 1302, 12 L. Ed. 2d 325 6

Norris Grain Company v. Nordaas, 232 Minn. 991, 46 N.W. 2d 94 3

Phillips v. Naaf, 339 Mich. 539, 52 N.W. 2d 158 7

Sache v. Wallace, 101 Minn. 169, 112 N.W. 386 2,3

Shelley v. Kraemer, 433 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 845, 3 A.L.R. 2d 441 6

Swanson v. Alworth, 159 Minn. 193, 198 N.W. 453 8

U.S. v. Guest, 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 6

U.S. v. Price, 383 U.S. 787, 86 S. Ct. 1152, 16 L. Ed. 267 6

Vallely v. Northern Fire and Marine Insurance Company 2

Miscellaneous:

16 Am. Jur. 2d Constitutional Law, Sec. 557, Page 960 5

46 Am. Jur. Judgments, Sections 22 and 657 3

IN THE

Supreme Court of the United States

October Term, 1971

Docket No. ———

WALTER R. ANDERSON, THEODORE C. ANDERSON, DAVID W. ANDERSON, and LAKELAND DEVELOPMENT CORPORATION, and THEODORE C. ANDERSON, as administrator D.B.N. of the estate of EUGENE ANDERSON, Deceased,

Plaintiffs-Appellants,

vs.

LECON PROPERTIES, INC., a Minnesota corporation,

Defendant-Appellee.

BRIEF OF PETITIONERS ANSWERING THE OPPOSITION BRIEF OF RESPONDENT

INTRODUCTORY

Under the circumstances of this case, it should suffice to answer seriatim the points raised by the respondent.

ARGUMENT

I

Respondent failed to discuss M.S.A. Section 586.01, which is printed at page 4 of the petition.

The importance of this section of the Minnesota Statutes is that it in effect prohibits the Supreme Court of Minnesota as well as all other courts of the state from issuing a writ of mandamus to "control judicial discretion." The importance of the prohibition is made clear by the decision of this court in *Vallely v. Northern Fire and Marine Insurance Company*, cited and discussed at pages 8 and 9 of the Petition. We think the quotation from the cited case on page 9 of the Petition to the effect that where courts act beyond their authority and in contravention thereof, their judgments and orders are nullities.

This point is emphasized by the case of *Sache v. Wallace*, 101 Minn. 169, 112 N.W. 386, cited and discussed at pages 8 and 9 of the Petition, where the Supreme Court of Minnesota held that a Judgment granting relief which the law declares shall not be granted is void and renders the judgment subject to collateral attack.

II

The judgment in the mandamus proceedings is subject to collateral attack.

This point was not reached and, hence, was not decided by either the Court of Appeals or the District Court below. Re-

spondent raises the point and that is the reason petitioners are answering it. This point is settled by both the decisions of this Court and also of those of the Supreme Court of Minnesota in the *Vallely* case of this Court and the cases of *Norris Grain Company v. Nordaas*, 232 Minn. 991, 46 N.W. 2d 94 and *Sache v. Wallace, supra.* The *Norris Grain Company* case is cited and discussed at pages 8, 9 and 10 of the Petition. In that case the court held that where, as here, the court acts without jurisdiction its judgment is a nullity and may be attacked collaterally at any time and at any place, and that "a court without jurisdiction of the subject matter of an action (as here) can acquire no jurisdiction by erroneous decision that it has jurisdiction."

In the *Norris Grain Company* case, the Supreme Court of Minnesota followed the *Matter of Baltimore Mail S.S. Co. v. Fawcett*, 269 N.W. 379, 199 N.E. 628, 104 A.L.R. 1068. This is the general rule throughout the United States.

46 Am. Jur., *Judgments*, Sections 22 and 657.

III

A Minnesota judgment is always open under Minnesota law for collateral attack for lack of jurisdiction of the subject matter.

This is settled by the decision of the Supreme Court of Minnesota in the *Norris Grain Company case, supra.* There the court said, among other things, (46 N.W. 2d, at p. 99):

> "Where the court has no jurisdiction of the subject matter and that fact appears from the face of the record its orders are a nullity."

That is the situation here and, consequently, under well-settled rules, mandamus proceedings in the Supreme Court of Minnesota are subject to collateral attack at any time and at any place. The quotation in the preceding section of this brief adequately demonstrates that fact.

IV

There was no contested adjudication by the Supreme Court of Minnesota that it had jurisdiction in the Mandamus Proceedings.

This point was not raised in the courts below but, notwithstanding such fact, respondent makes the statement without any legal support therefore that such an adjudication was made. We object to such a statement because it can not be found anywhere in the record. After all, courts speak through their records and where, as here, the decision of the Supreme Court of Minnesota fails to refer to the fact that there was a contest before that court on the question of jurisdiction to issue the mandamus the decision itself settles the matter. A copy of the decision of the Supreme Court is attached hereto and marked Exhibit A.

V

Respondent is liable for action taken "under color" of state law.

At the top of page 8 of respondent's brief, it cites four cases, one of which is the *Rooker* case decided by this court and three other cases decided by Courts of Appeal. Not one of these cases is in point. The *Rooker* case did not involve at all the question of whether the action taken was under color of state law. The

other cases cited involved questions of acts taken by individuals in which there was no resort to or involvement of state law. We have already demonstrated on page 11 of the Petition that the *Rooker* case is not in point for the reason that it holds simply that an action may not be maintained in a Federal Court to set aside a state judgment inasmuch as such an action would be in the matter of a review of the judgment by appeal. But this court has held in *Johnson v. Waters*, 111 U.S. 640, 28 L. Ed. 356, and *Arrowsmith v. Gleason*, 129 U.S. 86, 32 L. Ed. 635, which were cited and quoted from at page 11 of the Petition, that a separate and independent action for relief either upon the grounds that a state judgment is void for lack of jurisdiction or otherwise, does not constitute a review in the nature of an appeal and that such actions are maintainable notwithstanding that they involve the validity of state judgments. We quoted from the *Arrowsmith* case at page 11 of the Petition to show that such is the fact.

That the decisions cited by respondent on page 8 of its brief involving acts of individuals without any involvement of state action are not in point is made very clear by the text in 16 Am. Jur. 2d *Constitutional Law*, Section 557, page 960, where the text reads as follows:

> "It is the established general rule that the provisions of the due process clause in a state constitution and in the Federal Constitution are inhibitions upon the power of government and its agencies, not upon freedom of action of private persons. However, a violation of the due process guaranty may result from the interplay of governmental and private action where it appears that it is only after the initial exertion of state power that private action takes hold."

VI

The vacation of the Anoka county judgment in favor of petitioners and against the respondent by means of the mandamus proceedings instituted by respondent constitutes the deprivation of petitioners' rights to the judgment under color of state law.

This question was not reached below and, consequently, was not discussed at length in the Petition. However, respondent raises the question and we think that, whether the question is properly before the court now or not that it should be answered. The question of the Supreme Court of Minnesota, which the petitioners challenge, involved action under color of state law. This question has been litigated so often and so frequently that we refrain from extended discussion thereof. The rules are well settled by such cases as:

Shelley v. Kraemer, 433 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 845, 3 A.L.R. 2d 441.

N.A.A.C.P. v. Alabama, 377 U.S. 288, 84 S. Ct. 1302, 12 L. Ed. 2d 325.

Evans v. Newton, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373.

U.S. v. Guest, 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239.

U.S. v. Price, 383 U.S. 787, 86 S. Ct. 1152, 16 L. Ed. 267.

The rule is laid down with respect to this matter in the cases cited above and are well summarized by the following quotation from *Shelley v. Kraemer, supra* (433 U.S. 14):

> "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the

state within the meaning of the Fourteenth Amendment, is a proposition which has been long established by the decisions of this Court."

This rule has been followed in the other decisions of this Court quoted above and as far as we can ascertain is generally followed wherever the point in question has been raised. See: *Phillips v. Naaf*, 339 Mich. 539, 52 N.W. 2d 158.

VII

There is no basis for respondent's statement relative to the number of extensions granted by the Supreme Court of Minnesota.

There is nothing in the proceedings in either the Court of Appeals or the District Court to support such a statement. The question has been raised here even though it has not been decided below; but, we shall answer it. Petitioners assert that at least five such extensions were granted and expect to prove its assertions relative to the matter by the records of the Clerk of the Supreme Court of Minnesota.

VIII

The mandamus proceedings of the Supreme Court of Minnesota control the judicial discretion of the district judge of Anoka county.

The mandamus proceedings directed and compelled the District Judge of Anoka County to vacate the amended judgment in favor of the petitioners. The effect thereof was to require the District Judge to do precisely what the Supreme Court of

Minnesota ordered and directed. We differentially submit that this is control of judicial discretion. This is settled by the decisions of the Supreme Court of Minnesota in:

Briggs v. Chicago G.W. Ry. Co. 243 Minn. 566, 68 N.W. 2d 870 and

Swanson v. Alworth, 159 Minn. 193, 198 N.W. 453 (cited at page 8 of the Petition).

IX

Respondent's statement that the district court of Anoka county had no jurisdiction to amend the judgment is without any basis.

Respondent's sole contention is that such jurisdiction is lacking under the state Rule of Civil Procedure, Rule 60.02. This rule is the same as the Federal Rule 60(b). Aside from the rule the District Court of Anoka County had jurisdiction by terms of the remand of the Supreme Court of Minnesota which directed the District Court of Anoka County to grant such relief as the parties might be entitled to. Such a remand, quite apart from Rule 60.02, conferred jurisdiction on the Anoka County Court. In *Maryland Casualty Company v. Waldrep*, 10 Cir., 126 Fed. 555 at page 559, where there was a similar remand, the Court said:

> "But here the judgment of the district court remanding the proceeding to the county court of Pottawatomie County with direction to that court to proceed in accordance with the judgment, constituted a judicial determination that such county court should enter this particular order of surcharge; the judgment became final in that respect; and therefore the questtion of jurisdiction as between

the two county courts to enter the order is not open to review here."

This is another one of those questions which was not raised by either the Court of Appeals or the District Court. We have answered it because it has been raised and quite aside from the question of whether the question is properly before the Court.

CONCLUSION

It is respectfully submitted that this Court should review the decision below in order that we may have judicial consideration of all the points which petitioner urges and which they think entitled them to judgment. After all, this is an important case and the decision of this court will be extremely important to the petitioners as well as to others who may be similarly situated.

Respectfully submitted,

HARRY H. PETERSON
Attorney for Plaintiffs-Appellants
738 Midland Bank Building
Minneapolis, Minnesota 55401
335-5254

EXHIBIT A

OPINION

PER CURIAM.

Petition for a peremptory writ of mandamus seeking an order of this court requiring the district court to vacate its order entered April 15, 1970, and the amended judgment entered on April 21, 1970, and to grant petitioner's motion of January 30, 1970.

The issues raised in this proceeding are purely procedural and do not involve a review of any questions going to the merits of the action.

This action was commenced in 1967 and involved claims to real estate which had been sold by Lakeland Development Corporation (Lakeland) to Lecon Properties, Inc., (Lecon) in 1961. The trial was completed on August 30, 1968, and the trial court issued findings of fact, conclusions of law, and order for judgment on March 14, 1969. Judgment was entered on May 26, 1969.

In so far as relevant to this proceeding, the judgment decreed that Lecon "shall reconvey" its interest in the real estate to Lakeland "upon tender and payment" to Lecon by Lakeland "of all monies" Lecon paid to Lakeland and the fee owners for the property, together with taxes and assessments paid by Lecon, plus 6-percent interest per annum from the date of payments to the date of tender. The judgment then provided:

> "* * * Lakeland Development Corporation shall have six months from the date of this Judgment to make such tender and payment; and if Lakeland Development Corporation fails to do so, any claim it may have against Lecon Properties, Inc. and/or said land shall terminate."

Prior to the entry of judgment both Lecon and Lakeland made post-trial motions. Lecon sought amended findings eliminating its obligation to reconvey or in the alternative a new trial. Lakeland joined in a motion for amendment of the findings of fact and conclusions of law, which would permit Lakeland 12 months to make the tender or, in the event of appeal to the Minnesota Supreme Court, 12 months from the determination of the appeal. These motions were denied on May 9, 1969.

On June 12, 1969, following entry of judgment, Lecon appealed from the order denying its alternative motion and from the judgment to this court. As required by Rule 107, Rules of Civil Appellate Procedure, Lecon filed a cost bond. It did not choose to file a supersedeas bond. Rule 108, Rules of Civil Appellate Procedure. Lakeland did not appeal from the denial of its post-trial motion or from the judgment. Presumably, Lecon by its choice not to file a supersedeas bond intended to expose itself to the risk of having to reconvey the property if Lakeland made a tender within the time provided, despite its pending appeal.

On November 26, 1969, the time provided by the judgment for Lakeland to make tender to Lecon as a condition for reconveyance expired. On December 19, 1969, after the judgment became final as to Lakeland, Lecon made a motion in this court to remand the case to the district court to obtain relief from the judgment. Lecon alleged that Lakeland had failed to make the tender and payment and that Lakeland's interest in the land terminated by operation of the judgment, and upon being granted the relief prayed for its pending appeal would be dismissed. Lakeland opposed the motion on the grounds that Lecon's appeal had stayed the time when the tender or payment was required by the judgment to be made.

On January 19, 1970, we ordered this action remanded to the district court "to enable defendant Lecon to make, and the court to hear, a motion for relief from the judgment entered herein." Upon motion of Lakeland and the plaintiffs-respondents to also seek relief from the judgment on remand, this court clarified the January 19 remand order, declaring that the remand was intended to allow the district court to grant such relief from the judgment to any or all of the parties "as the facts and law may require or warrant." We intended thereby that the district court would determine whether in fact the tender or payment contemplated by the judgment had been made and, if no tender or payment was made, resolve the question which then would arise as to whether Lecon's appeal stayed the time to make tender.

In the district court on January 30, 1970, Lecon made a motion for an order that it is entitled to the real estate and that Lakeland take nothing against either the property or Lecon. Lakeland, with plaintiffs-respondents joining, made a motion to amend the judgment of May 26, 1969, to provide that tender or payment be made within 1 year after disposition of the appeal.

In the hearing on these motions Lakeland expressly admitted that no tender or payment had been made by it within the 6-month period provided for in the judgment.

The district court by its order entered on April 15, 1970, denied Lecon's motion but in response to Lakeland's motion ordered that the judgment should be amended to provide:

> "Lakeland shall have nine (9) months from the date of entry of judgment herein, or in the event there is an appeal to the Supreme Court by Lecon, six (6) months after final determination by the Supreme Court, to make such tender and payment, and if Lakeland fails to do so,

any claim it may have against Lecon and/or said land shall terminate."

In a memorandum the trial court explained:

"It was the original intention of the Court to give Lakeland a reasonable opportunity to pay back Lecon and thus regain its land. The Court now realizes that the time limit of six months after judgment was not reasonable even though Lecon had not appealed because of the uncertainty of title for the first three months in which an appeal could have been taken. Lakeland's financial position was such that it would have to use its equity in the land in question to finance repayment to Lecon.

"The Court feels it has the power under Rule 60.02 to amend its original 'conclusions' to give Lakeland six months after final determination by the Supreme Court to pay Lecon. This will make it unnecessary to rule on the more technical question of whether or not Lecon's appeal extended Lakeland's time to tender or repay Lecon."

Lecon then petitioned this court for a writ of mandamus, contending that its appeal did not stay the running of the time as specified in the judgment to make a tender or payment because no supersedeas bond was filed and that because the time to appeal had expired and the judgment had become final, the trial court lacked the authority to amend the judgment.

1. Generally, proceedings in the trial court are stayed only if a supersedeas bond is filed. Rule 108.01, Rules of Civil Appellate Procedure. It is elementary that, except as provided in Rule 108.01(6), the filing of a cost bond, as distinguished from a supersedeas bond, does not stay the proceeding in the trial court. Holmes v. Holmes, 253 Minn. 26, 91 N. W. (2d)

79; Lindberg v. Lindberg, 282 Minn. 536, 163 N. W. (2d) 870. See, also, State, by Clark, v. Robnan, Inc. 259 Minn. 88, 107 N. W. (2d) 51. As stated in 3 C.J., Appeal and Error, § 1448, p. 1322:

> "* * * It may also be stated as the general rule that the running of the time within which a judgment or decree requires a party to perform specified conditions is stayed or suspended pending an appeal from the judgment or decree *with a supersedeas bond.*" (Italics supplied.)

See, also, 4 Am. Jur. (2d) Appeal and Error, § 364. The failure of Lecon to file a supersedeas bond and the failure of Lakeland to take an appeal from the denial of its post-trial motion or the judgment and file a supersedeas bond resulted in a judgment which was in no wise stayed during the pendency of Lecon's appeal.

It necessarily follows that under the terms of the judgment and the undisputed fact of no tender or payment within the time required, Lecon by operation of the terms of the judgment is entitled to the property in question, free and clear of any claims of Lakeland unless the district court had the authority to reopen and amend the judgment.

2. We hold that the district court lacked the authority to amend the judgment entered on May 26, 1969, after the judgment had become final as to Lakeland.

The district court purported to act under the authority of Rules of Civil Procedure, Rule 60.02, which allows a court to relieve a party from a final judgment, order, or proceeding and to order a new trial or grant such other relief as may be just. Rule 60.02 can be utilized only if one of the six grounds

specified exists.[1] Brown's Bay Marine Corp v. Skrypec, 271 Minn. 523, 136 N. W. (2d) 590. The court did not state on which of the six clauses it was basing its decision.

In our examination of the file before us, we find no facts which would justify the granting of relief from the judgment to Lakeland under clauses 1 through 5. If facts were presented to the district court which would have allowed it to act under one or more of these clauses, they were not made part of the record nor were they presented to us when Lakeland appeared to contest this petition.

Therefore, the district court must have relied on Rule 60.02(6)—"any other reason justifying relief from the operation of the judgment." Rule 60.02(6) is a residual clause to cover any unforeseen contingency and it is exclusive of clauses (1) through (5). Newman v. Fjelstad, 271 Minn. 514, 137 N. W. (2d) 181; Simons v. Schiek's, Inc. 275 Minn. 132, 145 N. W. (2d) 548.

The district court seems to have decided that the time limit of 6 months, originally provided for in the judgment, was so unreasonable as to be a "reason justifying relief from the operation of the judgment." We are unable to agree with this conclusion. The court was informed of all the facts necessary to set a time limit at the time the judgment was entered. The court had denied a motion to amend the findings of fact and

---

[1] Under Rules of Civil Procedure, Rule 60.02, the court may grant relief "for the following reasons: (1) Mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.03; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

conclusions of law to provide for a time limit of 1 year or, in the event of an appeal, 1 year from determination of the appeal. Upon this record, nothing new was presented to the court between the time this motion was denied on May 9, 1969, and the time it granted Lakeland's similar motion on April 15, 1970 after the time to amend the judgment had expired.

Rule 60.02(6) was not intended to allow the district court to reopen or amend judgments beyond the normal time limit merely because the court feels it has committed some judicial error. Barrett v. Macdonald, 264 Minn. 560, 121 N. W. (2d) 165. Finality of judicial decisions requires that parties seek relief from judicial error through the appellate process, available to Lakeland in this case.

For the foregoing reasons we grant the writ of mandamus. The district court shall vacate the order of April 15, 1970, and the amended judgment entered on April 21, 1970, and grant petitioner Lecon's motion of January 30, 1970.

Let the writ issue.

MR. JUSTICE KELLY, not having been a member of this court at the time of the submission, took no part in the consideration or decision of this case.